

No. 14960

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United States  
Court of Appeals  
for the Ninth Circuit

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WM. P. STUART, Collector of Internal Revenue  
for the District of Arizona, Appellant,

vs.

J. E. WILLIS and KING-HOOVER CON-  
STRUCTION CO., Appellees.

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Transcript of Record

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Appeal from the United States District Court for the  
District of Arizona

FILED

FEB -8 1956

W. H. EN, CLERK



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United States  
Court of Appeals  
for the Ninth Circuit

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L. P. STUART, Collector of Internal Revenue  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

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United States Attorney,

OBERT S. MURLLESS,  
Assistant United States Attorney,

THAN B. STROUD,  
Special Assistant to the Attorney General,  
Federal Building, Phoenix, Arizona,  
Attorneys for Appellant.

NDERSEN AND RAY,  
ENNETH C. CHATWIN,  
Heard Building, Phoenix, Arizona,  
Attorneys for Appellees.



in the District Court of the United States for the  
District of Arizona

Civil No. 1828-Phx.

J. E. WILLIS and KING-HOOVER CON-  
STRUCTION CO., a Joint Venture,  
Plaintiffs,

vs.

WM. P. STUART, Collector, Defendant.

## COMPLAINT

### And Jury Trial Demand

Comes Now plaintiffs J. E. Willis and King-  
Hoover Construction Co., an Arizona Corporation,  
by and through their attorneys H. Verlan Ander-  
sen and Oakley J. Ray and for cause of action  
against Wm. P. Stuart as former Collector of In-  
ternal Revenue for the collection district of Arizona  
and allege:

### I.

Plaintiff King-Hoover Construction Co., is an  
Arizona Corporation, duly organized and existing  
under the laws of the State of Arizona, and plain-  
tiff J. E. Willis is a citizen and resident of the  
State and District of Arizona, and the defendant  
Wm. P. Stuart was at all times mentioned herein  
the duly appointed and acting Collector of Internal  
Revenue for the Collection District of Arizona; that  
plaintiffs were at all times mentioned herein part-  
ners in a joint venture organization doing business

as and under the name and style of King-Hoover Construction Co., and J. E. Willis.

## II.

That on or about the 6th day of November, 1951, plaintiffs herein became entitled to receive funds in the sum of \$12,278.18 from the United States Government, being the balance due plaintiffs for completion of a Railroad Rehabilitation job, contract number DA-02-002-AVI-30, Navajo Ordnance Depot, Bellmont, Arizona.

## III.

That on or about the 6th day of November, 1951, defendant herein, acting in his capacity as Collector of Internal Revenue for the District of Arizona levied an attachment on said sum of \$12,278.18 and applied \$8,667.23 thereof in payment of payroll taxes, which payroll taxes were not the obligation of these plaintiffs as a joint venture organization.

## IV.

That the entire amount of said sum of \$8,667.23 constitutes assets in which plaintiff, J. E. Willis, has the sole and exclusive equity and that said J. E. Willis is not either as a partner of King-Hoover Construction Co., or as an individual indebted to the defendant as Collector or to any other Collector for any payroll taxes which are now due and owing.

## V.

That plaintiffs duly protested the attachment of

that portion of said funds not applied in payment of obligations of plaintiffs and on the 26th day of December, 1951, plaintiffs duly and seasonably filed with the defendant as Collector of Internal Revenue in the form and manner provided by the Internal Revenue Code and the Regulations provided thereunder, their claim for refund of said sum of \$8,667.23 illegally and unlawfully attached by said defendant and set forth therein in detail their grounds for such claim.

## VI.

On or about the 29th day of July, 1952, said Collector of Internal Revenue notified plaintiffs by registered letter that said claim for refund had been disallowed in its entirety.

## VII.

That the attachment of the portion of said funds in the sum of \$8,667.23 was illegal and unlawful as foresaid in that the taxes, penalties and interest against which said sum was applied in payment were unlawfully assessed against the plaintiffs herein.

## VIII.

By reason whereof defendant owes the plaintiffs the sum of \$8,667.23 plus interest thereon from the 6th day of November, 1951, until paid.

Wherefore plaintiffs pray judgment against the defendant in the sum of \$8,667.23, plus interest thereon at the rate of 6% per annum from the 6th

day of November, 1951, until paid, for costs herein incurred and for all proper relief.

ANDERSEN AND RAY,  
/s/ By H. VERLAN ANDERSEN,  
Attorneys for Plaintiffs

### Jury Trial Demand

To W. P. Stuart, Collector of Internal Revenue,  
District of Arizona, Defendant:

You are hereby notified that trial by jury is demanded by plaintiff in the above entitled and numbered cause.

ANDERSEN AND RAY,  
/s/ By H. VERLAN ANDERSEN,  
Attorneys for Plaintiff

[Endorsed]: Filed December 17, 1952.

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[Title of District Court and Cause.]

### ANSWER

Now comes the above-named defendant, by his attorney, Edward W. Scruggs, United States Attorney in and for the District of Arizona, and for his answer to the complaint filed herein, alleges and says:

#### I.

Admits the allegations contained in paragraph I thereof, except it is denied that plaintiffs were at all times mentioned herein partners in a joint ven-



re organization doing business as and under the name and style of King-Hoover Construction Co., and J. E. Willis.

II.

Denies the allegations contained in paragraph II thereof, except it is admitted that on or about the 1st day of November, 1951, King-Hoover Construction Co. herein became entitled to receive funds in the sum of \$12,278.18 from the United States Government, being the balance due it for completion of the Railroad Rehabilitation job, contract number A-02-002-AVI-30; Navajo Ordnance Depot, Bellmont, Arizona.

III.

Denies the allegations contained in paragraph III thereof, except it is admitted that on or about the 1st day of November, 1951, defendant herein, acting in his capacity as Collector of Internal Revenue for the District of Arizona levied an attachment on the said sum of \$12,278.18 and applied \$8,667.23 thereof in payment of payroll taxes of King-Hoover Construction Co.

IV.

Denies the allegations contained in paragraph IV thereof.

V.

Denies the allegations contained in paragraph V thereof, except it is admitted that plaintiff filed a claim for refund on January 14, 1952.

VI.

Denies the allegations contained in paragraph VI

thereof, except it is admitted that on or about the 29th day of July, 1952, plaintiffs were notified by registered letter that said claim for refund had been disallowed in its entirety.

#### VII.

Denies the allegations contained in paragraph VII thereof.

#### VIII.

Denies the allegations contained in paragraph VIII thereof.

Wherefore, defendant prays that the complaint filed herein be dismissed, with costs to be assessed against the plaintiff.

Dated: April 13, 1953.

EDWARD W. SCRUGGS,  
United States Attorney,  
Attorney for Defendant

/s/ ROBERT S. MURLLESS,  
Assistant U. S. Attorney

Acknowledgment of Service attached.

[Endorsed]: Filed April 13, 1953.

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[Title of District Court and Cause.]

#### MOTION FOR ASSOCIATION OF COUNSEL AND ORDER

Comes Now Oakley J. Ray, one of the attorneys of record for the plaintiff in the above entitled and



numbered cause, and moves the court for an order associating Kenneth C. Chatwin, as counsel for plaintiffs.

Dated: This 29th day of March, 1954.

ANDERSEN AND RAY,  
/s/ By OAKLEY J. RAY,  
Attorney for Plaintiff

### ORDER

Upon motion of Andersen and Ray, attorneys of record for the plaintiff in the above entitled and numbered cause, it is

Ordered that Kenneth C. Chatwin be associated as counsel for plaintiffs.

Dated: This 31 day of March, 1954.

/s/ DAVE W. LING,  
Judge

Acknowledgment of Service attached.

[Endorsed]: Filed March 31, 1954.

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Title of District Court and Cause.]

### MINUTE ENTRY OF FRIDAY, JUNE 18, 1954

Honorable Dave W. Ling, United States District Judge, presiding.

This case comes on regularly for trial this day without a jury. H. Verlan Andersen, Esq. and Kenneth Chatwin, Esq., appear for the plaintiffs and Robert S. Murlless, Esq., Assistant United States

Attorney, appears for the defendant. On motion of Robert S. Murlless, Esq.,

It Is Ordered that Ethan B. Stroud, Esq., is entered as associate counsel for the defendant.

Counsel for the plaintiffs states the plaintiffs' case to the Court.

Counsel for the defendant moves to invoke the Rule. Said motion is granted and all witnesses are excluded from the courtroom excepting J. M. Stanford and Lowell Munsfees.

Counsel for the defendant states the defendant's case to the court.

Plaintiffs' Case:

J. M. Stanford is now duly sworn and cross-examined as an adverse party.

Plaintiffs' exhibit 4, Employers quarterly Federal Tax Returns and Schedule, is admitted in evidence.

Lowell Munsfees is now duly sworn and examined for the plaintiffs.

The following plaintiffs' exhibits are now admitted in evidence: 5, Power of attorney; 1, Agreement; 6, Assignment of claims.

At twelve o'clock noon, It Is Ordered that the further trial of this case be continued to 1:30 o'clock p.m.

Subsequently, at 1:30 o'clock p.m., the parties and counsel being present pursuant to recess, the further proceedings of trial are had as follows:

Plaintiffs' Case Continued:

Lowell Munsfees, heretofore sworn, is recalled and further examined for the plaintiffs.

The following plaintiffs' exhibits are now ad-

mitted it evidence: 2, Cancelled check; 7, three cancelled checks.

Kent Pomeroy is now duly sworn and examined for the plaintiffs.

The following plaintiffs' exhibits are now admitted in evidence: 3, Claim; 8, Copy of letter of May 22, 1952.

Sam Berger is now duly sworn and examined for the plaintiffs.

Plaintiffs' exhibit 11, Envelope containing Assessment Lists, is admitted in evidence.

The following plaintiffs' witnesses are now duly sworn and examined: William McRae, Claude Hoover.

The plaintiffs rest.

Both sides rest.

It Is Ordered that plaintiffs are allowed 30 days to file opening brief, defendant 30 days thereafter to file reply brief and the plaintiffs 20 days to file closing brief, and that the record show the case will be submitted thereon.

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Title of District Court and Cause.]

MINUTE ENTRY OF MONDAY, APR. 11, 1955

Honorable Dave W. Ling, United States District Judge, presiding.

This case having been submitted and taken under advisement,

It Is Ordered that the plaintiffs have judgment in accordance with the prayer of their complaint.

[Title of District Court and Cause.]

MOTION FOR EXTENSION OF TIME WITH-  
IN WHICH TO FILE OBJECTIONS TO  
FINDINGS OF FACT AND CONCLUSIONS  
OF LAW

Now, Defendant moves for an extension of time within which to file objections to proposed findings of fact and conclusions of law, to and including the 9th day of May, 1955.

Dated this 2nd day of May, 1955.

JACK D. H. HAYS,  
United States Attorney  
/s/ ROBERT S. MURLLESS,  
Assistant U. S. Attorney,  
Attorneys for Defendant

ORDER

Pursuant to the foregoing motion and the files and records in the above entitled and numbered matter, it is

Ordered that defendant have until and including the 9th day of May, 1955, within which to file objections to proposed findings of fact and conclusions of law.

Dated this 2nd day of May, 1955.

/s/ DAVE W. LING,  
Judge

[Endorsed]: Filed May 2, 1955.

Title of District Court and Cause.]

DEFENDANT'S OBJECTIONS TO (PROPOSED) FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY PLAINTIFFS

Now defendant, Wm. P. Stuart, objects to the proposed) Findings of Fact and Conclusions of Law submitted by plaintiffs, and filed on or about the 20th day of April, 1955, as follows:

1. Objection is made to proposed Finding of Fact number 1 on the ground that the contract dated November 16, 1950, does not establish a partnership nor a joint venture (Exhibit 1):
2. Objection is made to proposed Finding of Fact number 2 upon the grounds that the purported assignment by the King-Hoover Company, dated June 16, 1951, was insufficient, as a matter of law, and can not be considered as an assignment of the claim against the Collector or the Government, for any purpose:
3. Objection is made to Finding of Fact number 3 upon the grounds that it is an incomplete statement of the facts proved at the trial; objection is made on the further grounds said finding states, as proved, certain facts with respect to which there was no substantial evidence at the trial, defendant urging that there was no substantial evidence of any alleged or wrongful assessment, levy nor application of funds; and in this connection defendant



urges that the following is an essential part of any Findings of Fact upon the subject matter covered by defendant's proposed Finding of Fact number 3:

"That a tax arose on March 10, 1951, upon which date the assessment list was received by the defendant, as Collector of Internal Revenue, Internal Revenue Collection District of Arizona, at Phoenix."

4. Further objection is made to Finding of Fact number 3 upon the grounds that there was no substantial evidence that the payroll taxes were not the obligation of the plaintiff, King-Hoover Company for the reason that there was no evidence that the plaintiffs, nor either of them, were engaged in a joint venture:

5. Objection is made to proposed Finding of Fact number 4 upon the grounds that there was no substantial evidence that the plaintiffs were engaged in a joint venture:

6. Objection is made to proposed Finding of Fact number 5 on the same grounds and for the same reasons that the objection is made to Findings of Fact number 4 above: In this connection, defendant urges that the court should find as a fact:

"J. E. Willis never had any right, title, or interest to or in the contract DA-02-002-AVI-30 which the King-Hoover Company had with the Federal Government at Bellemont, Arizona:"

7. Further objection is made to the proposed

Findings of Fact number 1 through 5 inclusive, above mentioned, upon the grounds and for the reason that there is a failure to state the following as a Finding of Fact, which is first hereinafter quoted, and which the defendant urges is an essential part of any Findings of Fact in the above numbered and entitled matter:

“There was no overpayment of tax to the United States of America, the Internal Revenue Service, by either J. E. Willis or the King-Hoover Construction Company for or in respect to the year 1951.”

8. Defendant objects to each of the proposed conclusions of law upon the grounds and for the reasons that each of them is an improper statement of law insofar as the same may be applied to the above numbered and entitled matter; and for the further reason that each of the statements of law contained in said Conclusions of Law are neither relevant nor applicable to the facts fairly proved at the trial of the above numbered and entitled matter.

Dated this 9th day of May, 1955.

JACK D. H. HAYS,  
United States Attorney

/s/ ROBERT S. MURLLESS,  
Assistant U. S. Attorney,  
Attorneys for Defendant

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 9, 1955.

In the District Court of the United States in and  
for the District of Arizona

Civil Action—No. 1828-Phx.

J. E. WILLIS and KING-HOOVER CON-  
STRUCTION COMPANY, a Joint Venture,  
Plaintiffs,

vs.

WM. P. STUART, Collector, Defendant.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

The above entitled cause came on regularly for trial before the court sitting without a jury and the court, having duly considered the evidence in the case and being fully advised in the premises, makes the following findings of fact and conclusions of law.

#### Findings of Fact

1. That the plaintiffs above named were partners in a joint venture organization doing business as and under the name and style of King-Hoover Construction Company and J. E. Willis, by reasons of the terms of that certain contract in writing dated the 16th day of November, 1950. (P. Exhibit 1).

2. That plaintiff, King - Hoover Construction Company made an assignment of all of its right, title and interest in the proceeds of funds due from the United States Government under contract number DA-02-002-AVI-30 Navajo Ordnance Depot,



Bellmont, Arizona, by assignment dated June 16, 1951 (P. Ex. 6).

3. That the defendant, acting in his capacity as collector of Internal Revenue for the District of Arizona, levied an attachment on the sum of \$12,-78.18 due the plaintiffs from the United States Government under contract number DA-02-002-LVI-30 Navajo Ordnance Depot, Bellmont, Arizona; and that out of said sum of the amount of \$8667.23 was applied to payroll taxes which were not the obligation of the plaintiffs as a joint venture.

4. That all obligations of the joint venture to the United States Government were fully paid and discharged.

5. That the sum of \$8667.23 was due plaintiff J. E. Willis under the joint venture agreement and that plaintiff King-Hoover Construction Co., as a member of the joint venture had no right, title, interest or equity in and to said \$8667.23.

6. That the plaintiff, J. E. Willis made proper claim to the Collector of Internal Revenue for refund of the sum of \$8667.23 on the 26th day of December, 1951.

7. That the Collector of Internal Revenue, by notice to plaintiffs by registered letter dated on or about the 29th day of July, 1952, disallowed plaintiff's claim for refund in its entirety.

#### Conclusions of Law

1. That the agreement in writing executed by the

plaintiffs on the 16th day of November, 1950, admitted as plaintiff's exhibit 1 in evidence created a joint venture between the parties.

2. That the assignment executed by plaintiff King-Hoover Construction Company dated the 16th day of June, 1951, to J. E. Willis, admitted as Plaintiff's Exhibit 6 in evidence, gave the plaintiff J. E. Willis, a lien on the proceeds of that certain contract number DA-02-002-AVI-30 Navajo Ordnance Depot, Bellmont, Arizona, prior and superior to that of the United States Government except for the claim of the United States Government for payroll taxes and other deductions growing out of the performance of said contract in the sum of \$3610.95.

3. That the defendant wrongfully and illegally levied upon the proceeds of said contract due the joint venture and wrongfully and illegally applied the sum of \$8667.23 to obligations of the King-Hoover Construction Co.

4. That the defendant wrongfully refused to grant plaintiff's claim for refund.

## JUDGMENT

On the foregoing findings of fact and conclusions of law,

It Is Hereby Ordered, Adjudged and Decreed that the plaintiff J. E. Willis have judgment against the defendant for the principal sum of \$8667.23, together with interest thereon at the rate of 6% per

num from the 6th day of November, 1951, until  
aid, and for plaintiff's costs in the sum of \$30.80.

Dated: This 8th day of June, 1955.

/s/ DAVE W. LING,  
Judge of the District Court of the United States  
for the District of Arizona.

Affidavit of Service by Mail attached.

[Endorsed]: Produced Filed April 20, 1955.

[Endorsed]: Filed June 8, 1955.

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Title of District Court and Cause.]

#### DEFENDANT'S NOTICE OF APPEAL

Notice Is Hereby Given that the defendant,  
above-named, hereby appeals to the United States  
Court of Appeals for the Ninth Circuit. This ap-  
peal is from the judgment of the United States  
District Court for the Judicial District of Arizona,  
entered on June 8, 1955, in the above entitled  
matter.

Dated this 1st day of August, 1955.

JACK D. H. HAYS,  
United States Attorney  
/s/ ROBERT S. MURLLESS,  
Assistant U. S. Attorney,  
Attorneys for Defendant

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 1, 1955.

[Title of District Court and Cause.]

## ORDER EXTENDING TIME FOR FILING RECORD AND DOCKETING APPEAL

On the ex parte application of defendant, the Court being fully advised,

It Is Ordered that the time for filing the record on appeal with the United States Court of Appeals for the Ninth Circuit and for docketing therein the appeal taken by the defendant by Notice of Appeal filed August 1, 1955, is extended to October 31, 1955, pursuant to Rule 73(g) of the Federal Rules of Civil Procedure.

Dated this 8th day of September, 1955.

/s/ DAVE W. LING,  
Judge, United States District Court for the Dis-  
trict of Arizona.

[Endorsed]: Filed September 8, 1955.

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[Title of District Court and Cause.]

## DEFENDANT'S STATEMENT OF POINTS

The defendant, above-named, appellant, who is perfecting or has perfected this appeal to the United States Court of Appeals for the Ninth Circuit, said appeal being from the judgments of the United States District Court for the District of Arizona, that is (1) order for judgment of April the 11th, 1955, and (2) Judgment signed, entered

and filed on June the 8th, 1955 (Findings of Fact, conclusions and Judgment).

In this regard the defendant intends to rely upon the following points upon this appeal to the United States Court of Appeals for the Ninth Circuit, that is:

1. The trial court erred in holding that it had jurisdiction of this action, since taxpayers' claim for refund was at a variance with the complaint:
2. The trial court erred in holding that a bona fide partnership existed between Willis and the King-Hoover Construction Company:
3. The court erred in holding that the purported assignment of the corporation to Willis did not violate the Assignment of Claims Act:
4. The trial court erred in not holding that the government's tax lien was superior to that of Willis, even if the assignment to Willis be held to be a legal assignment:
5. The court erred in allowing taxpayers interest in the amount of the judgment, by reason that there was no overpayment, but the taxes were allocated to a specific account.

Dated this 1st day of November, 1955.

JACK D. H. HAYS,  
United States Attorney

/s/ ROBERT S. MURLLESS,  
Assistant U. S. Attorney

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 1, 1955.



[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

United States of America,  
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in case No. Civ-1828 Phoenix, J. E. Willis and King-Hoover Construction Co., Plaintiffs, vs. Wm. P. Stuart, Collector, Defendant, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the minute entries are true and correct copies of the originals thereof remaining in my office in the city of Phoenix, State and District aforesaid.

I further certify that the said original documents, and said copies of minute entries, together with the original exhibits transmitted herewith, constitute the record on appeal in said case as designated in the Appellant's Designation filed therein and made a part of the record attached hereto and the same are as follows, to-wit:

1. Plaintiffs' Complaint.
2. Summons.
3. Minute entry of February 12, 1953.

4. Defendant's Answer.
5. Motion and Order associating counsel for plaintiffs.
6. Plaintiffs' Motion to Set.
7. Minute entry of June 18, 1954.
8. Plaintiffs' Opening Brief.
9. Defendant's Brief.
10. Plaintiffs' Reply Brief.
11. Minute entry of April 11, 1955.
12. Plaintiffs' Proposed Findings of Fact and Conclusions of Law (being the same as document No. 15).
13. Motion and Order Extending Time to file objections to proposed findings.
14. Defendant's Objections to Plaintiffs' Proposed Findings of Fact and Conclusions of Law submitted by Plaintiffs.
15. Findings of Fact, Conclusions of Law and Judgment.
16. Notice of Appeal.
17. Order Extending Time for Filing Record and Docketing Appeal.
18. Statement of Points Upon Which Defendant intends to Rely.
19. Designation of Contents of Record on Appeal.
20. Reporter's Transcript of Proceedings.

I further certify that the originals of Plaintiffs' Exhibits 1, 2, 3, 4, 5, 6, 7, 8 and 11 in evidence and 9 and 10 marked for identification are transmitted herewith as a part of this record on appeal.

Witness my hand and the seal of said Court this  
2nd day of December, 1955.

/s/ WM. H. LOVELESS,  
Clerk

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In the District Court of the United States in and  
for the District of Arizona

Civil Action No. 1828-Phx.

J. E. WILLIS and KING-HOOVER CON-  
STRUCTION COMPANY, a Joint Venture,  
Plaintiffs,

vs.

WM. P. STUART, Collector,                      Defendant.

### TRANSCRIPT OF PROCEEDINGS

Proceedings had and evidence taken in the above  
entitled cause before the Honorable Dave W. Ling,  
Judge of said court, in his court room in the  
United States Court House, at Phoenix, Arizona,  
commencing on the 18th day of June, A.D. 1954,  
at ten o'clock a.m.

Present: Andersen and Chatwin, by Mr. H. Ver-  
lan Anderson and Mr. Kenneth C. Chatwin ap-  
peared on behalf of Plaintiffs. Mr. Robert S. Murl-  
less, Assistant U. S. Attorney, Phoenix, Arizona,  
and Mr. Ethan B. Stroud, Special Assistant to the



Attorney General, Washington, D. C., appeared on behalf of Defendant. [1\*]

The Clerk: Civil No. 1828 Phoenix. J. E. Willis and King-Hoover Construction Company, a joint venture, versus William P. Stuart, Collector of Internal Revenue, defendant. For trial.

Mr. Andersen: Plaintiff is ready. Mr. Andersen and Mr. Kenneth C. Chatwin for the plaintiff.

Mr. Murlless: If your Honor please, may Mr. then B. Stroud of the Tax Division of the Department of Justice be associated for the purpose of the lawsuit?

The Court: All right, he may be.

Mr. Murlless: And then the defendant is ready.

The Court: You may proceed, gentlemen.

Mr. Andersen: Would your Honor like an opening statement?

The Court: Yes.

Mr. Andersen: This case arises, if the Court please, out of a claimed overpayment made for Federal Social Security and Withholding Taxes.

The plaintiff here, Mr. J. E. Willis, as claimed by the plaintiff, was a joint adventurer with the King-Hoover Construction Company, a corporation, on a particular government job carried on near the city of Flagstaff, Arizona.

The plaintiff intends to prove that an [2] agreement was entered into between this corporation and Mr. Willis, under the terms of which Mr. Willis was

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\* Page numbers appearing at top of page of original Reporter's transcript of Record.

to advance some \$50,000 in funds, which advance would permit the King-Hoover Construction Company to obtain a bond which was necessary in order for it to qualify as the bidder on that Army job.

We further intend to show, your Honor, that this advance of fifty thousand was made, and that the condition for the advance of the fifty thousand dollars, as expressly stated in the terms of the agreement, was that Mr. J. E. Willis should be secured in this advance by having a prior claim on the proceeds which were to come as payment for the job from the United States Army.

The plaintiff also intends to show, your Honor, that according to this arrangement, the \$50,000 was advanced, the job was duly completed, the funds which were due under the terms of the contract with the Army became due and payable. That Mr. Willis, through his agent, Mr. Lowell Monsees, attempted to get these funds, and before the final payment got into his hands, the funds were taken by the defendant here in payment of payroll taxes and withholding taxes owed by the King-Hoover Construction Company to the Federal Government.

It is our position, your Honor, that these [3] funds were not liable for application of payment of those liabilities.

It is further our position that the plaintiff herein had an equitable lien upon the funds from the moment the contract was entered into, and that this lien was prior in nature to any lien which the Government may have had or attempted to exercise when it took these funds by its levy.

Mr. Stroud: If your Honor please, we would like to invoke the rule at this time.

The Court: All right.

Mr. Stroud: And we have a representative from the Internal Revenue Service with us here, and although he was subpoenaed by the plaintiff, we would like to have him sit to our right as an assistant.

The Court: All right. He will be accepted.

All other witnesses retire from the court room, please. Witnesses excluded.

Mr. Andersen: If the Court please, we have as one of our witnesses Mr. Lowell Monsees, whom we assert is the agent of the plaintiff here, and with the Court's permission, we would like to have him remain.

The Court: All right.

Mr. Stroud: Your Honor, we have also subpoenaed Mr. George Hill, who is one of the officers of the [4] King-Hoover Construction Company. We will not use him until it is our time to be up, and if he could be excused until that time, subject to being available by telephone.

The Court: All right.

Mr. Stroud: If your Honor please, I think that the facts in this case will show that there were two contracts involved.

The first contract was one which the King-Hoover Construction Company itself entered into with an Army Base in Bellmont, Arizona, for the rehabilitation of some railroad depot grounds in Bellmont. I think the evidence will show that the Govern-

ment was the first party, and that the King-Hoover Construction Company alone and by itself was the second party to that contract.

Pursuant to that contract, the evidence will show the King-Hoover Construction Company received some seven payments on that contract, which checks were made to them, to the King-Hoover Construction Company.

The second contract that is involved in this lawsuit, if your Honor please, is a so-called joint venture agreement entered into between the King-Hoover Construction Company, as well as Mr. King and Mr. Hoover, as first parties, and Mr. and Mrs. J. E. Willis as [5] second parties.

Now, we think we will show by the evidence that Mr. and/or Mrs. Willis had no rights under this first contract with the Government, that the money when received by the King-Hoover Construction Company was the King-Hoover Construction Company money, was their property, and being their property, they could do with it what they pleased. We expect to show that.

And it was that money which I think the evidence will show which King-Hoover Construction Company—rather, which the Government levied on, and took, I think it was, some \$11,000. And of that the plaintiffs here claim some \$8600 belonged to one of the joint, alleged so-called joint venturers, Mr. and Mrs. J. E. Willis.

We say that neither Mr. or Mrs. J. E. Willis had an interest. Mr. or Mrs. J. E. Willis had no right, title or interest in that money, that it was the

property of the King-Hoover Construction Company.

And this is a salient fact, if your Honor please, and I think counsel has admitted it in his opening statement, and I think it is an admitted fact, that the King-Hoover Construction Company owed these taxes, and their only contention, as I understand it, their only contention is that this so-called joint venturer or partner, that is, Mr. and Mrs. J. E. Willis, that the money was theirs, and through the [6] joint venture belonged to them.

We say that the tax was owed by the King-Hoover Construction Company, and that it was properly assessed, and we properly collected it.

The plaintiffs, as we understand their allegations, further claim that there was this so-called partnership, or joint venture.

We think the contract, of course, speaks for itself, and that it was a financing agreement, and no doubt the contract, which will be introduced in evidence, will show, among other things, that the \$50,000 was advanced by Mr. Willis on 8 per cent interest, with the possibility if the project was successful, he might get 25 per cent interest on his investment.

At no time was this so-called joint venture or partnership alleged, prior to the time the Government took the money, was it alleged to be a partnership.

In fact, these people held themselves out to all the world, if the Court please, that they were the King-Hoover Construction Company, and the evi-



dence will show that they filed income tax returns showing that they were the King-Hoover Construction Company.

The evidence will show that there was not [7] a Federal income tax co-partnership return filed, that is, by any so-called alleged joint venture or partnership.

The evidence will show there was no capital account standing on the books of the King-Hoover Construction Company showing a partner by the name of J. E. Willis. Mr. Willis had no distributive share in the so-called partnership. He had no right to any money which the partnership made, which the partnership might earn. He received no salary from the so-called partnership.

In fact, his only right was as a creditor for a loan which he advanced, and we submit to the Court that under those facts he was nothing but a creditor, and we came in ahead of him, and the money which we took for the taxes which were owed was rightfully ours.

There are other facts which we will prove to your Honor if we have to prove anything, which will show that this was not any partnership, and we think under the facts and the evidence as it will be adduced here that your Honor should enter judgment for the defendant.

Thank you.

The Court: Call your first witness.

Mr. Andersen: We call Mr. Jack Stanford [8] for cross-examination under the statute, as the agent of the Government.

JACK M. STANFORD

called as an adverse witness by the plaintiffs, for cross-examination, having been first duly sworn, was examined and testified as follows:

Cross-Examination

Q. (By Mr. Andersen): Will you state your name, please? A. Jack M. Stanford.

Q. What were you doing during the years 1950 and 1951, Mr. Stanford?

A. I was employed by the Internal Revenue Service in the District of Arizona.

Q. That is still your job, is it? A. Yes.

Q. What were your duties in connection with this employment?

A. I was a deputy collector. My duties were in minor supervisory capacity over a group of deputy collectors.

Q. Did you work under the direction and supervision of the defendant in this action, Mr. Stuart?

A. I did. [9]

Q. Particularly, Mr. Stanford, was it your duty and obligation to collect income taxes which had been assessed, income and withholding and payroll taxes which had been assessed against various people in this district?

A. Yes, sir, that is right.

Q. What was your authority in connection with this capacity, Mr. Stanford?

A. I don't believe I understand your question, Mr. Andersen.

Q. Would you tell the Court briefly what you

(Testimony of Jack M. Stanford.)

were authorized to do by way of making these collections?

A. I was authorized to collect past due delinquent taxes as evidenced by warranty for distraint, by distraint, seizure, and sale of property, levy upon debts of various types owed to the taxpayer.

Q. Did you have an investigatory duty in connection with that?

A. To the extent of determining what assets or funds there were available upon which distraint could be made.

Q. It is my understanding, Mr. Stanford, that in the performance of your duties as an employee in this capacity, you take upon yourself certain delinquent taxpayers, shall we say, and follow through on those [10] particular ones, is that right?

A. In the capacity that I was in at the particular time that the collection efforts of the then Collector of Internal Revenue were being made on this King-Hoover account, I was in the capacity, as I said, of a minor supervisor.

I was not actually myself charged directly with the collection of those accounts. I acted and worked along with the man that was assigned the document or warrant for distraint.

Q. Can you tell us who that was?

A. They may have changed hands. I think they did.

I think there were two or three different individuals that were actually assigned those accounts at that time.



Testimony of Jack M. Stanford.)

One, I believe, was Mr.—was a deputy collector by the name of Gregory Jimsik; I believe Mr. Sam Berger, and Mr. Horton Yager.

Q. Do you know Mr. Lowell Monsees here?

A. I do.

Q. When did you first meet him?

A. I believe I met Mr. Monsees some time previous to the King-Hoover matter, but just when that was, I am not sure.

I believe I met him when he had a real [11] state office on Monroe Street, between First Avenue and Central Avenue.

Q. But your main association or connection with Mr. Monsees was due to this delinquent account of King-Hoover Construction Company which you mentioned? A. Yes.

Q. Can you tell us when you started to confer with Mr. Monsees about this account, and where it was?

A. I think it must have been sometime during the latter part of 1951. At that time, I called on him at his office on south Central Avenue, just between Jefferson Street.

Q. Could you state what the purpose of your visit there was, Mr. Stanford?

A. This particular visit that I recall in particular was after the claim for refund had been filed by Mr. Monsees, and the purpose of the visit was to ask Mr. Monsees certain questions relative to the claim for refund.

(Testimony of Jack M. Stanford.)

Q. Do you know the date the claim for refund was filed, Mr. Stanford?

A. I don't know offhand, no, sir.

Q. Do you mean to say that you hadn't contacted Mr. Monsees about that account prior to the date the claim for refund was filed? [12]

A. I am sure that we had, yes.

Q. Where was that, Mr. Stanford?

A. I recall at the south Central Avenue address, and I recall, I believe, filing a levy, serving a levy on Mr. Monsees at that address.

Q. Yes. Now, calling your attention to the attachment of this particular amount of money involved in this lawsuit, the \$12,000 and some odd that was attached by the Collector.

Prior to the time that this money became due and owing, did you discuss this particular amount or sum with Mr. Monsees?

A. I don't believe that I did. I am not sure of that, though.

Q. Isn't it true, Mr. Stanford, that you talked to Mr. Monsees in the office of Mr. McRae of the Collector's office?

A. I think that is probably true. I have a memory of Mr. Monsees being in our office in connection with this matter.

Q. And would you say that was prior in time to the date that this money was attached by the Government?

A. I couldn't say, Mr. Andersen. It possibly was. I don't believe so, though.

(Testimony of Jack M. Stanford.)

I think our file definitely reflects that [13] we, shortly after becoming aware of this fund owing, that we served a levy and I have no positive memory of having talked to Mr. Monsees prior to the service of the levy.

Q. You mentioned a moment ago, Mr. Stanford, that you had gone down to Mr. Monsees's office, and that you had spoken to him there you thought sometime before this levy was made.

Were you down there for the purpose of finding out what assets were owned by King-Hoover Construction Company?

A. First, I don't believe, Mr. Andersen, that I said prior to the date the levy was made——

Q. You aren't certain about that?

A. I said prior to the date the claim was filed, possibly.

Q. To I understand your testimony to be now, Mr. Stanford, that you hadn't discussed this particular sum of money that was to become due with Mr. Monsees prior to the date that it did become due?

A. My memory of the thing, Mr. Andersen, is that I don't believe that I was aware that Mr. Monsees was in any way connected with our taxpayer, King-Hoover Construction Company, until we had filed this first levy on the funds. [14]

I am referring to the levy which was paid now, the first one.

Q. You are not certain about that, though?

A. Well, that is my best memory on it. It happened some time ago, and I felt, in thinking back

(Testimony of Jack M. Stanford.)

over this, I have always taken—my thoughts have always been that the first indication of Mr. Monsees' interest in the matter was after we had filed the first levy.

Q. Do you know the amount of this first levy?

A. It was something over \$11,000.

Q. Could it have been over twelve thousand?

A. Yes.

Q. Was it not in fact \$12,278.18?

A. That is right, I believe.

Q. And can you say when that levy was made?

A. I believe it was made about August 20th, 1951, or shortly thereafter.

Q. Do you know when the funds actually were obtained by the Collector's office?

A. I can't state the date definitely. It was sometime—I believe there was quite a delay. I would say offhand that it must have been sometime in October, 1951.

Q. Could it have been November 6th, 1951?

A. It could have been, yes. [15]

Q. And so when you made this levy, between that date, which you state was, to the best of your recollection, in August, between that date and the date the funds were actually obtained, you did have discussion with Mr. Monsees, did you?

A. I believe that would be right. Surely sometime between that date, Mr. Monsees—I became aware that Mr. Monsees had an interest.

Q. Did you know what Mr. Monsees' interest was?

Testimony of Jack M. Stanford.)

Mr. Stroud: Your Honor, we object to that question. We object to any interests Mr. Monsees may have had, and ask that that be stricken from the record. I don't think it is proper for counsel to prove agency by this gentleman here, if that is what he is attempting to do.

Mr. Andersen: This isn't our object, to prove agency here, especially. We are trying to get from this witness his information about this subject at this particular time. I think it is thoroughly competent.

The Court: Go ahead.

Mr. Andersen: Read the question please.

(The pending question was read by the Reporter.)

A. (By The Witness): I think he explained to me what he claimed his [16] interest was, yes.

Q. (By Mr. Andersen): Could you tell the court what that was?

Mr. Stroud: Same objection, if your Honor please. It would be hearsay, not properly connected up as yet. No agency of any type, or interest.

The Court: They probably will later.

Mr. Andersen: We will, your Honor.

A. (By The Witness): My memory is that Mr. Monsees alleged that the person whom he was representing, Mr. Willis, had advanced funds on this particular Government contract, against which we had levied, and that he was entitled to be paid before the Government, that Mr. Willis was entitled to be paid before the Government's levy was on.



(Testimony of Jack M. Stanford.)

Q. (By Mr. Andersen): Did he give you any other information about this arrangement between Mr. Willis and the construction company?

A. Well, I think probably he did, Mr. Andersen, but offhand I feel we probably discussed the matter, and Mr. Monsees no doubt did furnish some other information, but, in general, that was the main point, as I recall it. [17]

Q. Did he mention anything to you about an assignment which had been made by the construction company to Mr. Willis?

A. He may have. I don't recall for sure.

My impression, or my thinking after whatever discussion I may have had with Mr. Monsees was that this was just a financing arrangement, and that the Government would be entitled to go ahead and levy on the amount.

Mr. Andersen: Would you mark this for identification?

The Clerk: Plaintiffs' Exhibit 1 for identification.

(Said Agreement was marked Plaintiffs' Exhibit Number 1 for identification.)

Q. (By Mr. Andersen): I hand you Plaintiffs' Exhibit 1 for identification, and ask you if you have ever seen this document before, Mr. Stanford?

A. I can't definitely say whether I have seen it or not, Mr. Andersen.

In explaining that answer, I would like to say that this particular case was more or less, to a point, anyway, a routine matter with us, and I have at-

Testimony of Jack M. Stanford.)

empted to recall in the last few days to memory anything [18] that I may have heard or seen on the matter.

Thinking along the lines of ever having seen a document such as this, I haven't been able to definitely recall whether I did or didn't.

Q. Do you ever remember discussing that particular document either with Mr. McRae or Mr. Monsees? A. No.

Q. You did know, did you not, that Mr. Monsees was not an officer of King-Hoover Construction Company?

A. Yes, I had no knowledge if he was an officer.

Q. But you knew he was acting on behalf of Mr. Willis, did you? A. Yes.

Q. And that the reason he was so acting was because Mr. Willis had placed this \$50,000 into this particular job, is that right?

A. That is right. And my understanding was that he was attorney in fact for Mr. Willis.

Q. Mr. Monsees told you he was worried about getting his money back, didn't he?

A. I think that he indicated that for his client, es.

Q. Did you tell him that you had made this levy upon these funds of \$12,278.00?

A. I can't definitely remember whether I did or not. [19] I feel sure that we must have informed him of that.

Q. Is it not true, Mr. Stanford, that you made an agreement with Mr. Monsees that you would not



(Testimony of Jack M. Stanford.)

bother those funds, but that you would allow them to come into his hands?

A. I don't believe that is right, no, sir. No.

Q. You don't recall any such agreement?

A. No.

Q. Isn't it true that Mr. Monsees told you that he was interested in paying all payroll taxes, withholding taxes due for wages paid on this particular job, and that he would pay those?

A. I don't have any positive memory of his having made such a statement, no.

Q. Didn't you discuss with him the amount of payroll taxes and withholding taxes due on this particular job?

A. We may have. I don't know for sure about that either.

Q. Would that not be part of your responsibility to make inquiry about the payroll taxes on this job?

A. Yes. Whether we made inquiry of Mr. Monsees or not, I don't know. It wouldn't necessarily follow that we would have.

Q. Did you ask Mr. Monsees about what assets King-Hoover [20] Construction Company owned?

A. I have no positive memory of asking him. It could very well be that I did, though.

Q. Wasn't that the object of your visit with Mr. Monsees in his office?

A. I don't recall, Mr. Andersen, that long ago. It was in connection with this whole matter, I am sure, but what specific points these visits covered, I don't recall.

Testimony of Jack M. Stanford.)

Q. Don't you recall asking Mr. Monsees whether or not they were going to make or lose money on this particular job at Flagstaff?

Mr. Stroud: Your Honor, I think the witness has answered. He said he didn't remember. I think it is repetitious.

The Court: Oh, I think so.

Q. (By Mr. Andersen): Did you understand that Mr. Monsees was paying a portion of these payroll taxes?

A. I don't believe I ever had any understanding that Mr. Monsees was paying a portion of them, no.

Mr. Andersen: Mark that for identification, please.

The Clerk: Plaintiffs' Exhibit 2 for identification. [21]

(Said Cancelled Check marked as Plaintiffs' Exhibit 2 for identification.)

Q. (By Mr. Andersen): Do you know, Mr. Stanford, whether or not Mr. Monsees ever sent a check to the Government in payment of these delinquent payroll taxes, or in payment of any payroll taxes in connection with this job at Flagstaff?

A. I am afraid I would have to answer that that just don't have any positive memory on it.

It would be a matter that wouldn't necessarily have stayed in my mind at all, and I just don't remember.

Q. I hand you Plaintiffs' Exhibit 2 for identification, and ask you if you have ever seen that document before?

(Testimony of Jack M. Stanford.)

A. Well, I don't have any positive memory of ever having seen it. It may be that I did see it. I don't know.

Q. Would it be your business to know when any money was received on these accounts on which you were working?

A. Not necessarily, except possibly in a general way.

As I have said, I was acting in a supervisory capacity, and didn't have at all times complete [22] information in regard to the collection of these particular delinquent taxes.

Q. Do you have with you, Mr. Stanford, the information as to when the assessments and demand for payment were made of the King-Hoover Construction Company for payroll taxes for 1951, and for the last quarter of 1950?

A. I, myself, don't have those with me, no, sir. They are records that are not under my jurisdiction or custody.

Q. Does Mr. Berger have that information?

A. I believe that he has, yes.

Q. Do you have the items which were listed on the subpoena duces tecum delivered to you by the Marshal?

A. Most of those items, Mr. Andersen, were not in my custody, so I don't have.

Q. Does Mr. Berger have those items?

A. I don't think Mr. Berger has most of them either.

testimony of Jack M. Stanford.)

(Handing documents to counsel.) The first listed items referring to the claim for refund documents, the only documents that we would have in our office, or that we would have in our office here were duplicates, possibly, or carbon copies of some of these that you have asked for here. I think the originals [23] were transmitted to the Internal Revenue, Washington, office.

Q. Do you have any of these documents at all in your possession now, or did you bring any of them with you?

Mr. Stroud: To shorten this up, Mr. Andersen, I think I have most of those in my possession here. What is it specifically you are asking for?

Mr. Andersen: I will tell you.

Mr. Stroud: Your Honor, we are not willing to stipulate to any of the information stated in the Claim for Refund filed by the plaintiffs.

Counsel just asked if we were willing to stipulate to it. We will not stipulate to it. It is self-serving.

We will stipulate they filed a Claim for Refund. The answer admits that. And I think they have taken proper procedural methods to get into the court, but we won't stipulate any of the matter in the Claim for Refund is true or false.

We have the Claim here, if they would like to see it.

Q. (By Mr. Andersen): Did you ever see the Claim for Refund filed by the King-Hoover Construction Company and Mr. Willis, Mr. [24] Stanford?

(Testimony of Jack M. Stanford.)

A. I may have, Mr. Andersen. It was filed so long ago, I couldn't say for sure about that. It would have gone into our office and be processed the same as any other claim.

Q. Would not the claim have come over your desk?

A. Not necessarily, no, sir.

Q. Or any letters in connection with it?

A. No.

Q. Who would have seen this Claim for Refund in your office, and letters connected with it?

A. That would depend, Mr. Andersen, as to how it was sent. If it were mailed to anyone's attention in particular, it would have been, it would have gone to them first, and then under usual procedure, would have been transmitted to our Wage and Excise Branch for processing.

Q. You can't say, then, that you have or have not seen the Claim for Refund?

A. Not definitely, no. The only possibility that I may have seen it was if it were mailed to my attention. Otherwise, ordinarily, I wouldn't have seen it.

Mr. Andersen: May this be marked for identification, please?

The Clerk: Plaintiffs' Exhibit 3 for identification. [25]

(Said Claim referred to was marked as Plaintiffs' Exhibit 3 for identification.)

Mr. Andersen: I think that is all at the present time, your Honor.



Testimony of Jack M. Stanford.)

Mr. Stroud: May I ask a couple questions?

The Court: Yes.

Examination

Q. (By Mr. Stroud): Mr. Stanford, the assessment was made by the Commissioner against King-Hoover Construction Company for the taxes in question, is that right? A. That is right.

Q. There is no doubt but what those taxes were levied by the King-Hoover Construction Company, is that right, sir?

A. I don't think so, no.

Mr. Stroud: That is all.

Further Cross-Examination

Q. (By Mr. Andersen): On what basis were these assessments made? Were they made on the basis of the returns filed by King-Hoover Construction Company?

A. As far as I know, they were on the basis of a voluntary disclosure of the liability. [26]

I think there was one return which was filed and signed under authority of Section 3612 of the Internal Revenue Code by one of our—by myself, I believe, in that case.

Q. Do you have copies of those returns here with you?

A. No, I don't have those either.

Mr. Andersen: Are you willing to stipulate to those?

The Witness: I have the return.

Mr. Andersen: Will you stipulate they were made on that basis?

(Testimony of Jack M. Stanford.)

Q. (By Mr. Andersen): Who else besides Mr. Berger would know about this case, Mr. Stanford?

A. Mr. Yager was concerned in the collection of the account also.

Mr. Andersen: Will you mark this for identification, please?

The Clerk: Plaintiffs' Exhibit 4 for identification.

(Said Employer's Quarterly Federal Tax Returns and Schedules were marked for identification as Plaintiffs' Exhibit Number 4.)

Q. (By Mr. Andersen): I hand you Plaintiffs' Exhibit 4 [27] for identification, and ask you if you can identify that document?

A. Well, these are returns of social security and withholding taxes filed in the name of King-Hoover Construction Company.

Q. And you made your assessment based upon these returns, didn't you? A. Yes.

Q. Can you tell the Court when demand for payment of this was made?

A. I don't have the records.

Q. You don't have the dates on it?

A. I don't have the records.

Q. Does Mr. Berger have the records on it?

A. Yes, I believe he does.

Mr. Andersen: We offer in evidence Plaintiffs' Exhibit 4 for identification.

The Court: Do you have any objection?

Mr. Stroud: No objection to Plaintiffs' Exhibit 4, if the Court please.



testimony of Jack M. Stanford.)

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit 4 in evidence.

(Said Employer's Quarterly Federal Tax Returns and Schedules were received in evidence and marked as Plaintiffs' Exhibit 4.) [28]

Mr. Andersen: I believe that is all.

Mr. Stroud: No questions.

The Court: That is all.

(Witness excused.)

The Court: We will have our morning recess this time.

(A short recess was had.)

The Court: You may proceed.

Mr. Andersen: I call Mr. Monsees.

### LOWELL L. MONSEES

called as a witness in behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

Q. (By Mr. Andersen): Will you state your name, please?

A. Lowell L. Monsees, M-o-n-s-e-e-s.

Q. Where do you live?

A. 536 West Virginia, Phoenix.

Q. How long have you lived in this area, Mr. Monsees?

A. Since 1936.

Q. What is your present occupation?

A. I am a realtor and investment broker. [29]

Q. Do you know Mr. J. E. Willis?

A. Yes, sir.

(Testimony of Lowell L. Monsees.)

Q. How long have you known him?

A. Since 1949.

Mr. Andersen: May this be marked for identification, please?

The Clerk: Plaintiffs' Exhibit 5 for identification.

(Said Power of Attorney was marked as Plaintiffs' Exhibit 5 for identification.)

Q. (By Mr. Andersen): I hand you Plaintiffs' Exhibit 5 for identification, and ask you if you recognize that document? A. Yes, sir.

Q. Will you tell the Court what it is?

A. That is a general Power of Attorney given me by Mr. and Mrs. Willis to sign all documents, and do business in their behalf.

Q. In the State of Arizona?

A. In the State of Arizona.

Mr. Andersen: We offer Plaintiffs' Exhibit 5 in evidence.

Mr. Stroud: May I ask this witness a question on voir dire, your Honor?

The Court: You may.

Q. (By Mr. Stroud): Mr. Monsees, did you receive this [30] Power of Attorney in the mail?

A. No, sir.

Q. Where did you, and when did you receive it?

A. Right here in Phoenix over at the First National Bank.

Q. Did you see these people sign their signature here? A. Yes, sir.

Mr. Stroud: We object to the introduction of the

Testimony of Lowell L. Monsees.)

document, your Honor, for the reason we don't believe an agent can prove his agency by himself. We don't believe the document is properly authenticated.

Mr. Andersen: If the Court please, this is the very reason we have this document, is so that Mr. Monsees need not prove the agency by himself.

The Court: All right, it may be received.

The Clerk: Plaintiffs' Exhibit 5 in evidence.

(Said Power of Attorney was received in evidence and marked Plaintiffs' Exhibit Number 5.)

Q. (By Mr. Andersen): Will you state what you as agent for Mr. Willis? What are your general duties? What have they been?

A. I have handled Mr. Willis's investments in the State of Arizona, since prior to this contract, however.

This contract—this Power of Attorney was [31] given me after I had made several transactions for him to his satisfaction, and he wanted me to continue to do business for him while he was out of state.

Therefore, he gave me a general Power of Attorney to buy and sell and transact business for him in his absence.

Q. When did you first contact the offices of King-Hoover Construction Company, or when did they first contact you?

A. Well, our office wrote bonds for the King-Hoover Construction Company prior to the time

(Testimony of Lowell L. Monsees.)

that I was directly interested in this case in this Government job. I knew of their operation.

I was referred—they were referred to me on this particular job through their accountant, who was a neighbor and good friend of mine.

King-Hoover Construction Company had been in operation in this area for a number of years, and being in the real estate and investment business, I knew of their operations for quite some time.

Q. Did you on behalf of Mr. Willis enter into an agreement with the King-Hoover Construction Company? A. Yes, sir.

Q. I hand you Plaintiffs' Exhibit Number 1 for identification, and ask you if you recognize that document? [32] A. Yes, sir.

Q. And will you tell the Court what it is, please?

A. Well, it is an Agreement that was entered into between the King-Hoover Construction Company and Mr. and Mrs. J. E. Willis, a joint venture, to do this particular job.

Q. That is the job at Flagstaff?

A. At Flagstaff, Government job, number so and so. It is a long number here.

Q. Do you know the signatures that are on that document? A. I do.

Q. And did you see Mr. Hoover sign that?

A. Yes, I did.

Q. And Mr. King?

A. Yes, I did, that is right.

Q. And your signature appears there, does it?

estimony of Lowell L. Monsees.)

A. That is right.

Q. And that is your signature?

A. That is.

Mr. Andersen: We offer Plaintiffs' Exhibit 1  
for identification in evidence.

Mr. Stroud: No objection.

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit 1 in evidence. [33]

(Said Agreement referred to was received in  
evidence and marked as Plaintiffs' Exhibit 1.)

Q. (By Mr. Andersen): Mr. Monsees, were there  
any other agreements about this Flagstaff job be-  
tween you, as agent for Mr. Willis, and the King-  
Hoover Construction Company, which were not in-  
corporated in this Agreement? A. I think not.

Q. That is, this Agreement covered pretty much  
the relationship? A. That is right.

Q. Will you just tell the Court what you did in  
connection with this Flagstaff job, generally?

A. Well, from the very inception, you mean?

Q. Yes.

A. Well, as I stated a minute ago, I was ap-  
proached by the accountant for the King-Hoover  
Construction Company. I was informed of this job  
that was coming up, that it was going to be a good  
job, and that King-Hoover would like to bid on it,  
but they didn't have sufficient funds available at  
the time to make bond, and that if I was interested  
in going into the deal with them, make funds avail-  
able so that they could make bond, they would be



(Testimony of Lowell L. Monsees.)

interested in discussing it with us on a joint venture basis. [34]

Discussions proceeded, and we entered into this contract.

I deposited \$50,000 in a joint account, King-Hoover Construction Company and J. E. Willis, in the First National Bank for this particular purpose.

The job proceeded. It was set up in this bank account that I was to sign all checks, approve all bills that were paid, inspect the books, made regular inspection as I saw fit—

Mr. Stroud: Your Honor, if there is some agreement, we object to the witness testifying on that, if there is some other agreement, bank account agreement, I think that would be the best evidence of what it said or contained.

We would also like,—I think we have gotten to a crucial point in the case—we would also like testimony to be in question and answer form, rather than the voluntary statements of the witness, if we may.

The Court: This will probably save time to ask him to state what he did in connection with it.

Q. (By Mr. Andersen): Will you proceed, Mr. Monsees?

A. As the job progressed, I made my regular inspections at the Bellmont Ordnance Base.

I had a pass issued me by the Commanding [35] Colonel that would give me full run of the base where we were working.

(Testimony of Lowell L. Monsees.)

I contacted Mr. Hoover on the job. I contacted Mr. Cuthbert, who was general foreman, and in many cases I had to make decisions in Mr. Hoover's absence, because he was—well, decisions would have to be made. He would ask me what to do about it, and I would tell him what I thought, and that was the way it was done.

During the course of the job, Mr. Hoover got into difficulties on some other work, and because we were invested in the job, I became more active, because I wanted to protect my investment.

In fact, I loaned the company my own personal funds at one time. I transferred the joint account over to my personal account, because the joint account was delinquent—not delinquent, but there was no funds there, so I transferred it over to my own account.

And from July 10th, I believe it was, until the close of the job, I had handled all the funds on the job without any other signature.

I could go further in detail, if you want.

Q. It is your testimony, Mr. Monsees, that the funds involved in this job were all kept separate from any funds of the King-Hoover Construction Company? [36]

A. Yes, sir.

Q. Now, you said something about your having to sign all checks?

A. I did sign. It was set up when the job started. It was set up in the—when I deposited the \$10,000 in the bank, it was established at that time that my signature must appear on all checks.



(Testimony of Lowell L. Monsees.)

Q. Did you deal with the material suppliers who supplied material for these jobs? A. I did.

Q. Could you name some of them?

A. Well, the Arizona Hardware Company in Flagstaff.

Mr. Stroud: Your Honor, we object to the question, "Dealing with".

It calls for a conclusion. It is non-descriptive. We don't know what counsel means by dealing with.

Mr. Andersen: I think, your Honor, the witness can state what he did by way of dealing.

The Court: Did you purchase material from these people?

The Witness: Yes.

Q. (By Mr. Andersen): Did you correspond with these material suppliers?

A. I did. [37]

Q. Would you name one or two others?

A. Well, L. B. Foster was the major supplier of all equipment and supplies on the job.

Arizona Hardware Company, and several sub-contractors I dealt directly with.

Q. Was J. H. Baxter Company of Texas involved in this deal?

A. Yes, sir. They were one of the big suppliers.

Q. Did they contact you for payment of their bills? A. They did.

Q. They sent the bills to your office, did they?

A. Yes, sir.

Q. And all payments of these bills were made out of this bank account that you speak of?

Testimony of Lowell L. Monsees.)

A. That is right.

Q. What arrangements were there made, Mr. Monsees, to secure the repayment of this \$50,000 you as agent for Mr. Willis?

A. Well, we were to get some of the proceeds of the job—our contract called for 25 per cent, the turn of our investment plus 25 per cent of the net profit.

Q. Or eight per cent?

A. Or eight per cent interest on our investment, whichever was greater.

Q. Were all proceeds from this job deposited in this [38] particular bank account?

A. Yes, sir.

Q. That is, with the exception of the last sum of \$12,278.00?

A. Yes, sir, that is correct.

Q. Did these funds come direct from the Army to your office?

A. They come directly from the Army to the King-Hoover Construction Company and my office together. They don't come directly to my office. They come to the King-Hoover Construction Company and my office.

Q. You mean that is the way they were addressed? A. That is right.

Q. How much of this \$50,000 was repaid to you?

A. You mean finally?

Q. Yes. A. \$45,000.

Q. Then there is still five thousand plus your share of the profits due you from this venture?

(Testimony of Lowell L. Monsees.)

A. That is correct, yes, sir.

Q. Do you know whether or not the job made a profit?

A. Yes, sir. The books show they did.

Q. Of approximately how much?

A. As I recall, it was twenty-three, \$24,000.

Q. Of which you claim 25 per cent, is that right? [39]

A. That is right.

Q. You heard the testimony here of Mr. Stanford, Mr. Monsees.

Calling your attention to your dealings with the office of the Collector of Internal Revenue, did you have conversation with these people about the proceeds from this job?

A. Yes, sir.

Q. Can you state when that was and who was present?

A. Well, I had numerous conversations with Mr. Stanford and Mr. Berger.

I don't recall when the first one was on this particular job.

I have known the Internal Revenue Office for quite some time, being a business man, and I have known both of these gentlemen prior to the time that I became interested in this job.

The exact date when I first discussed the King-Hoover job with Mr. Stanford I can't tell you, but I remember discussing it at several times.

Q. Approximately when?

A. I would say it was May or June.

Q. Of 1951?

A. Of 1951.

Q. Could you tell the Court in substance what

Testimony of Lowell L. Monsees.)

These [40] conversations were, as near as you can remember?

A. The first definite recollection I have of discussing this job was when, I can't say that it was after the levy was made, or whether it was about to be made, but it was along about that time.

And we discussed my position with this job, and they were interested, they were primarily interested in getting their money. And I remember definitely telling them that I intended for them to get it, along with all the other creditors getting paid every nickel that was due them on this particular job.

I also told them that I had nothing to do with any of King-Hoover's other obligations or other jobs that they had worked on, or were in trouble on.

I was only interested in the railroad rehabilitation job, and I knew that if the job was completed, there would be sufficient funds to pay all indebtedness, and I was given to understand that the job would be allowed to be completed, and that the funds would be coming through in the normal channels, and that at that time the Internal Revenue Department, along with all other creditors, would be paid off.

Q. Who gave you this understanding, Mr. Monsees?

A. Mr. Stanford and Mr. Berger. [41]

Q. Did they indicate to you that they would not make this last sum of money that became due under the terms of this contract?

A. They did.

(Testimony of Lowell L. Monsees.)

Q. They told you that they would allow it to come through in the regular course?

A. That is correct, yes, sir.

Q. Did you have any conversation about an assignment of these funds from the King-Hoover Construction Company to you?

A. That is correct.

Q. Who did you talk that over with?

A. With the same gentleman, Mr. McRae.

Mr. Stroud: We object to any testimony about any assignment, if your Honor please, unless the document is produced. I think it would be the best evidence.

The Court: I think you have reference to Exhibit 1, don't you? Isn't that what you are talking about, your Exhibit 1?

Mr. Andersen: No. It is another document.

Would you mark this for identification, please?

The Clerk: Plaintiffs' Exhibit 6 for identification.

(Said Assignment of Claims was marked as Plaintiffs' Exhibit Number 6 for identification.) [42]

Q. (By Mr. Andersen): I hand you Plaintiffs' Exhibit 6 for identification, and ask you if you have ever seen that document before?

A. Yes, sir.

Q. What is it?

A. It is an Assignment of Claims under a Government contract.



(Testimony of Lowell L. Monsees.)

Q. Do you recognize the signatures on the second page of that document? A. I do.

Q. Whose are they?

A. C. E. Hoover, President of the King-Hoover Construction Company, and the secretary is George Hill.

Mr. Andersen: We offer in evidence Plaintiffs' Exhibit 6 for identification.

Q. (By Mr. Andersen): First, was this document delivered to you by George Hill?

A. That is correct.

Q. And it does represent an agreement between you, as agent for Mr. Willis, and the corporation?

A. That is correct.

Mr. Stroud: May I have a question on voir dire, your Honor? [43]

The Court: You may.

Q. (By Mr. Stroud): You say, Mr. Monsees, that this document was delivered to you by Mr. Hill?

A. I was in the room when it was signed.

Q. How was it delivered to you, sir?

A. Handed to me.

Q. Mr. Hill handed it to you?

A. I think that is correct.

Q. Who else was present at the time this was signed besides you and Mr. Hill, and Mr. Hoover?

A. I believe his secretary was. I am not quite clear on that.

Q. Whose secretary, sir?

A. Mr. Hill's secretary.



(Testimony of Lowell L. Monsees.)

Q. Where were you at the time, sir?

A. In Hill's office.

Q. In Mr. Hill's office? A. Yes.

Q. What was the date of the meeting?

A. I don't recall.

Q. Well, was it in 1950, 1951, or 1952?

A. 1951.

Q. It was in 1951? A. Yes. [44]

Q. Did you actually see Mr. Hoover sign this?

A. I am sure I did, yes.

Q. Well, I say, did you see him sign, sir?

A. Yes, I did.

Mr. Stroud: Your Honor, we object to the introduction of the document as being irrelevant and immaterial, and it hasn't been shown yet that they complied with the United States statutes in executing this assignment, and we think until they do prove that feature that the assignment would have no force and effect. It would be illegal.

Mr. Andersen: If the Court please, we are not too particularly concerned about the force or effect of this, except we introduce it for the purpose of showing the arrangement between these two parties.

The Court: Well, it may be received subject to the objection.

The Clerk: Plaintiffs' Exhibit 6 in evidence.

(Said Assignment of Claims referred to was received in evidence and marked as Plaintiffs' Exhibit Number 6.)

Q. (By Mr. Andersen): Did you tell Mr. Stan-

Testimony of Lowell L. Monsees.)

rd and Mr. Berger about this assignment, Mr. Monsees?

A. Yes, sir, I am sure they knew about the assignment. [45]

Q. You discussed it with them, is that right?

A. Yes, sir, that is correct.

Q. And you also discussed the agreement, the original agreement between Mr. Willis and the King-Hoover Construction Company with them, did you? A. Yes, sir.

Q. And did you also discuss it with Mr. McRae?

A. Yes, sir.

Q. You spoke to the Commanding Officer at Bellmont, did you? I think you said, Mr. Monsees?

A. Yes, sir.

Q. Did you tell him your connection with this case? A. Yes, sir.

Mr. Andersen: I believe that is all at this time, your Honor, if we may ask the witness further questions at a later time.

The Court: All right.

#### Cross Examination

Q. (By Mr. Stroud): Mr. Monsees, who made the bid on the construction contract in Bellmont, Arizona, sir? A. King-Hoover.

Q. Do you know who they made the bid to up there? Do you know who the party was, the person? [46] A. The party to whom——

Q. The bid was made?

A. No, sir, I couldn't tell you the man's name.

(Testimony of Lowell L. Monsees.)

Q. The contract—I believe we issued a subpoena duces tecum on you yesterday.

Do you have that contract with you at this time, sir?      A. No, sir, I don't have.

Q. Do you have a copy of the contract with you, or in your home, or anywhere that you can obtain it?

A. No, sir, my attorney, I think—don't you have a copy of that?

Mr. Andersen: You are speaking, are you, Mr. Stroud, of the contract between the Government and the King-Hoover Construction Company?

Mr. Stroud: Yes, sir.

Mr. Andersen: With reference to this Bellmont, job?

Mr. Stroud: Yes, sir.

Mr. Andersen: We haven't been able to find a copy of that contract.

Q. (By Mr. Stroud): Did you ever see that contract, Mr. Monsees?      A. Yes, sir.

Q. It was a contract, as I understand it, was it, [47] sir, between the King-Hoover Construction Company and the Government?

A. That is correct.

Q. Who was it on it—who was of the first party of the Government, do you recall?

A. Well, I forget the branch. There was a particular branch of the Government. I don't recall the exact heading now. There are so many of them.

Q. The contract was for the construction of and rehabilitating a railroad in Bellmont, Arizona, is

Testimony of Lowell L. Monsees.)

Is that correct? A. The Ordnance Depot.

Q. And King-Hoover was the construction company that was going to do the work on this contract, is that right?

A. That is correct, at the time the bid was made. If they could have made bond, they would have made it themselves, without us.

Q. The money was advanced by you on behalf of Mr. Willis, I believe you testified, for the financing of this bond, is that correct?

A. That was one purpose of it. It was the money that was used to finance the job.

Q. Did either you or Mr. Willis have anything to do with the construction up there in Bellmont?

A. Yes, sir.

Q. What was that?

A. Well, I answered that. In a supervisory capacity, in some cases. You could call it financing. I spent a lot of time on the job.

Q. What supervisory capacity, to take that up for a moment, did you do, Mr. Monsees?

A. Well, I handled all of the financing of the job. That was my part of the job.

Q. You were only up in Bellmont approximately one month, were you, sir?

A. Well, sometimes I was up there once a week, but I didn't go on regular inspection, unless I was called there on trouble. It was only once a month, that is right.

Q. And Mr. Willis, the person who loaned this money, where did he live? Where is his home?

(Testimony of Lowell L. Monsees.)

A. He has two homes, one in Kankakee, Illinois, and one in Phoenix, Arizona.

Q. To your knowledge, was he ever down here inspecting on the job? Did he ever go to Bellmont, so far as you know?

A. Never went to Bellmont.

Q. And your job was to countersign the checks, as though it were paid out of this fund, is that correct, [49] this \$50,000 fund, along with Mr. Hoover?

A. That was one of my jobs.

Q. What else did you do?

A. Well, I approved all the paying of all bills. I inspected the books.

Q. Well, your connection in paying the bills was only countersigning the checks, wasn't it, Mr. Monsees?

A. I never signed a check until I approved it, and I had to know that it was correct before I signed it.

Q. Who did you rely on for getting that information?

A. Our auditor and bookkeeper.

Q. I see. Now, you didn't attempt to exercise any supervisory capacity up on the job, the actual construction of this rehabilitation job, did you?

A. I was consulted at various times, and particularly any time a major decision had to be made.

Q. What decision do you speak of?

A. Well, for example, extending a contract, or taking on extra work on the job. We had two ex-



estimony of Lowell L. Monsees.)

sions up there that we wouldn't have taken unless I had approved it.

Q. You were involved in that aspect of it because of the money which you were in charge of watching after of Mr. Willis's, is that correct?

A. That was one purpose. [50]

Q. You didn't actually take part in any of the overseeing of the construction of the job, did you, Mr. Monsees?

A. We had a general foreman for the running of the job.

Q. Mr. Hoover, Claude Hoover, of the King-Hoover Construction Company, as well as his foreman, actually did that work, did they not?

A. That is correct.

Q. Now, do you know to whom the checks—do you know how many payments were made on this construction job from time to time?

A. Not right offhand, I couldn't tell you.

Q. Were there some payments made in 1950?

A. I believe there was one come in in 1950. I couldn't swear to that, though.

Q. It was a Government check, was it, or how was the payment made?

A. That is correct, a Government check.

Q. Who was the check made payable to?

A. King-Hoover Construction Company.

Q. What did the King-Hoover Construction Company do with the check when it was received?

A. It was brought to my office and taken over



(Testimony of Lowell L. Monsees.)

A. That is right.

Q. But there was no other indication on the account, or on the checks as signed here that Mr. Willis was connected with the account in any way, was there?

A. Well, when the account was opened, I have a check there, a copy of a check that showed that it was made to the King-Hoover Construction Company and J. E. Willis.

Q. Do you have that with you?

A. Yes, sir.

Q. Would you produce it, please?

Mr. Andersen: Here it is. (Handing document to counsel.)

Q. (By Mr. Stroud): What is this instrument you have [54] handed me, Mr. Monsees?

A. That is a second copy of a voucher check. All checks that I write for Mr. Willis are written on a voucher check system that has three copies, one for my records, one for my bookkeeper, and one goes back to Mr. Willis. This is my copy.

Q. This was to the Valley National Bank in Phoenix?

A. It was written on the Valley National Bank.

Q. And it was for deposit in the First National Bank?

A. To that account, correct.

Q. And that is where the King-Hoover Special Account was kept, wasn't it?

A. Yes, sir.

Q. This shows that a deposit was made to the Special Account in the First National Bank, does it not?

A. That is correct.

testimony of Lowell L. Monsees.)

Q. This does not show the title or the name of the Special Account in the First National Bank building here in Phoenix, does it? A. No.

Q. Now, I ask you if there was any information, exhibits, or affidavits in your possession which showed that the name of this Special Bank Account was anything other than the King-Hoover Construction Company Special [55] Account?

Do you have any instrument of that description in your possession, sir?

A. No, sir, I do not. No money came out of that bank account except my signature was on it.

Q. That is right. You countersigned all the checks that came out of that bank account, along with Mr. Hoover?

A. That is right.

Q. And you checked on the funds that came out of that account, did you not?

A. Yes, sir.

Q. And the reason that you did that was because of this financing that Mr.—the money that Mr. Willis had loaned to the King-Hoover Construction Company? A. Partially, yes.

Q. In other words, you had your hands on the audit, of the money, you had your hand on the purse strings, didn't you, sir?

A. Right, yes, sir.

Q. All right. The so-called joint venture or partnership, of which you say you were agent for Mr. Willis, did not at any time file any Federal income tax co-partnership returns, did they, sir?

(Testimony of Lowell L. Monsees.)

A. Not to my knowledge. I didn't have anything to [56] do with the bookkeeping of this.

Q. There were no such returns filed?

A. No.

Q. You didn't do any of the bookkeeping in connection with this project in Bellmont, Arizona, did you, sir?

A. No, sir.

Q. Who did that, please?

A. Well, sir, they had a bookkeeper by the name of Sterling Page.

Q. You say that that was the King-Hoover Construction Company?

A. That is right.

Q. The King-Hoover Construction Company did all of the accounting and all of the bookkeeping, did they not, Mr. Monsees?

A. Well, they had an outside auditor do the auditing.

Q. They or their auditor did the bookkeeping and the accounting, did they not?

A. Well, I would say he was my auditor as well as theirs, because I paid the bill.

Q. You mean you co-signed the check that paid the bill along with Mr. Hoover?

A. Not entirely. Mr. Willis paid some of it out of [57] his funds.

Q. Mr. Willis paid some of what out of his funds?

A. Some of the auditor's expense.

Q. You mean Mr. Willis loaned this company additional money in addition to the \$50,000 from time to time?

A. Yes.

Q. I see. Now, then, I believe you testified a

Testimony of Lowell L. Monsees.)

moment ago that you made decisions in Mr. Hoover's absence up on the job in Bellmont?

A. Yes.

Q. Do you recall a meeting that you had with Mr. Stanford and Mr. Berger of the Internal Revenue Service, in which they asked you certain questions, and you gave them certain answers which they wrote down, which meeting occurred sometime in 1952, perhaps May of 1952?

A. I had a lot of meetings with those fellows.

Q. Do you remember a particular meeting at which both of those gentlemen were present?

A. Yes.

Q. Do you happen to remember they asked you certain questions, and took certain of your answers down at that time?

A. Well, they always had a scratch pad around when I was around. [58]

Q. In other words, they took down everything you said?

A. Just about. I should have taken more down myself.

Q. Do you recall telling them you had no supervisory capacity whatsoever on the job in Bellmont? Do you recall making that statement to them?

A. I don't recall that.

Q. Could you have made such a statement to them at that time?

A. From a construction standpoint, that is correct. I didn't have anything to do with the actual

(Testimony of Lowell L. Monsees.)

construction work on the job, the supervision of the men on the job, I had no control over.

Q. That was the King-Hoover's responsibility?

A. That is correct, yes, sir.

Q. They did the construction, and completed the job up there, did they not?

A. Yes, sir.

Q. Do you recall telling those agents at that time and on that occasion that you had no active voice in furthering the completion of the job up there in Bellmont?

A. No, sir, I don't.

Q. You don't recall telling them that?

A. No, sir.

Q. Could you have made such a statement to them at [59] that time?

A. Well, if I made it, it was not correct, because I was definitely responsible for getting that job completed, because that was the only way we could get our money back out of the job.

Q. In what way were you responsible for getting the job completed, Mr. Monsees?

Q. By getting the final pay check back in our hands, so we could pay the bill. That was the biggest job I had.

Q. In other words, the co-signing of the checks again?

A. No, I had quite a difficult time keeping those checks that were due on that job coming through. It was, I say, difficult for this reason. The Internal Revenue Department were very hot on King-



(Testimony of Lowell L. Monsees.)

Hoover's trail, trying to collect funds that were due them. I am not questioning that they were due.

Q. That is admitted, is it not, Mr. Monsees, that the tax was actually due?

Mr. Andersen: If you know, Mr. Monsees.

A. (By the Witness): Well, I know that the taxes were paid in full on our job at the time, as the money come through. I think our books will show that the taxes were paid, with [60] the exception of the last payment, and that would have been paid if the final check had come through.

We didn't intend to beat anybody out of a nickel, and everybody was paid in full on this job except Mr. Willis.

Q. (By Mr. Stroud): Do you know that of your own knowledge? Have you checked the books and inspected them? A. Yes, sir.

Q. When did you do that?

A. Well, when the final audit was made.

Q. Who made the final audit?

A. Kent Pomeroy.

Q. You mean the final audit of the King-Hoover Construction job?

A. This railroad rehabilitation job.

Q. Now, then, going back again—I think my question was that you had no active voice in furthering the completion of the job up there, other than the signing of the checks, and I believe you stated you were seeing to it that the funds kept coming through?



(Testimony of Lowell L. Monsees.)

A. Let us put it this way. The job wouldn't have been completed if it hadn't been for me, if that means anything to you.

Q. Would you explain that, sir? [61]

A. Because I had to advance money in addition to what we had originally agreed to advance to get the job completed.

Q. You loaned the King-Hoover Construction Company additional funds of your own?

A. That is correct.

Q. Those were in addition to the funds advanced by Mr. Willis? In other words, how much did you advance to the King-Hoover Construction Company of your own funds?

A. Well, at different times—there was, well, for example, suppose there was a bill come through, and they were going to not make another shipment of supplies unless they had received a check immediately.

They called me long distance. Our King-Hoover bank account was depleted. Our next draw hadn't come through. The only way we could get that material in so we could get another advance was for me to send that man a certified check, so that he would send the supplies, or release them. They would be sitting up here on a spur in Flagstaff paying demurrage, and we couldn't get that material on the job, and get the job done unless the freight bill was paid.

That was one instance, for example, so I paid

(Testimony of Lowell L. Monsees.)

, and when the money come through, I got my money [62] back.

Q. In other words, you made loans to them so that they could make the payments and get the material necessary to complete the job?

A. That is correct. If I was doing nothing but financing on this job, I would have foreclosed them back in May, and done the same thing you are trying to do now.

Q. Did you take any notes on the money you advanced King-Hoover Construction Company?

A. No, I didn't take notes. I didn't have to.

Q. Did Mr. Willis take any notes for the money advanced to the King-Hoover Construction Company?

A. Not except for the first fifty thousand.

Q. He took a promissory note for that amount?

A. Well, the contract itself says a note.

Q. I say, in addition to that, did he take a note for the fifty thousand dollars?

A. No, I don't think so.

Q. I thought your bid included taking a note for that?

A. I said the contract itself was a note.

Q. To your knowledge, was there any notes taken by Willis for the money he advanced?

A. No, not except that contract. [63]

Mr. Andersen: May we have reference to which contract that is, specifically, Mr. Monsees?

The Witness: Well, the original contract.

(Testimony of Lowell L. Monsees.)

Q. (By Mr. Stroud): Was that the contract of 16 November, 1950?

A. I don't recall the date it was signed.

Q. For which Mr. Willis advanced the \$50,000 to finance this project?

A. Yes.

Q. That is the contract you referred to?

A. That is the only time that Mr. Willis advanced him any of his own funds.

Q. And you considered that that contract was Mr. Willis' note for the money he so advanced?

A. That was his security, I will put it that way.

Q. I see. He didn't have any collateral security other than the personal liability of Mr. Hoover and Mr. King, and the King-Hoover Construction Company, is that correct?

A. That is right.

Q. And have any efforts been made by you or by Mr. Willis against Mr. Hoover or Mr. King on this contract?

A. No. We are not concerned about Mr. King and Mr. Hoover. If we get our favorable decision in this case here, there is plenty of funds to pay us off. [64]

Q. Mr. King and Mr. Hoover would be personally liable under the terms of this contract, would they not, sir?

Mr. Andersen: I think, your Honor, he is calling for a legal conclusion that this man isn't capable of answering. The instrument speaks for itself.

The Court: I agree.

Testimony of Lowell L. Monsees.)

Q. (By Mr. Stroud): The King-Hoover Construction Company itself was also liable under the terms of this contract, were they not, for the return of the money advanced by Mr. Willis?

Mr. Andersen: Same objection, your Honor.

The Court: Yes, I think so.

Q. (By Mr. Stroud): And you say, to your knowledge, no effort has been made by either you or Mr. Willis to bring an action or a suit, or to collect any money you may have owing to you from Mr. Hoover or Mr. King, or the King-Hoover Construction Company?

A. We would be very happy to collect money that is due us from any source we can get. I will be frank with you.

Q. Just answer the question.

The Court: You stated a moment ago you hadn't.

The Witness: No, I don't think so. It hasn't been [5] filed, or has there been action filed. Then I am mistaken. I didn't know it had been filed.

Q. (By Mr. Stroud): You didn't consult with Mr. Willis in reference to any of the policies on the job in Bellmont, Arizona, concerning this contract, did you, sir?

A. Mr. Willis, himself?

Q. Yes.

A. The only time Mr. Willis was consulted, he was consulted quite at length, prior to his entering into the contract.

Q. After that he wasn't consulted?

(Testimony of Lowell L. Monsees.)

A. Well, he was kept informed. I kept him posted as the job progressed, yes.

Q. I see. Do you know whether the company had any capital account set up for Mr. or Mrs. Willis on its books of account?

A. I couldn't tell you that.

Q. Did Mr. Willis receive at any time money on this contract as it was completed from time to time?

A. No, sir.

Q. When did he receive his money, Mr. Monsees?

A. I have a schedule in my books when he received money back.

Mr. Andersen: Would you like to have this?

The Witness: Yes.

What was that question again?

Q. (By Mr. Stroud): I said, did Mr. Willis receive any money from time to time on the construction contract?

A. You mean profit, or the original principal?

Q. Just some money.

A. Yes, he received some money.

Q. When did he receive the first amount there?

A. On July 10th.

Q. Of what year?

A. 1951.

Q. And what was that?

A. \$12,800.00.

Q. Was that a return of his principal?

A. Partially.

Q. And when did he receive the next amount?

A. November the 6th, 1951.

Q. And how much was that?



Testimony of Lowell L. Monsees.)

A. Twenty-five thousand.

Q. And when did he receive the next amount?

A. On November 13th.

Q. What was that amount?

A. Fifteen thousand.

Mr. Andersen: If the Court please, if we can  
ve [67] time, we will be glad to have this sched-  
e from which Mr. Monsees is testifying put in  
vidence.

The Witness: In between, however, there was  
ore money advanced by me, so that is the balance  
et right there.

Q. (By Mr. Stroud): That is summarizing?

A. Yes.

Q. Can you tell us, sir, how much money Mr.  
Willis has received back?

A. He has received \$45,000 of the original \$50,-  
00 invested.

Q. Of his original \$50,000 loan, he has received  
\$5,000 back? A. That is correct.

Q. Do you know how this account was set up  
n the books of the King-Hoover-Willis Construc-  
on Company?

Mr. Andersen: I think it has been asked and  
answered, that he didn't know, your Honor.

The Court: Yes, he didn't know anything  
out it.

Q. (By Mr. Stroud): Mr. and/or Mrs. Willis  
id not receive any salary from the King-Hoover  
onstruction Company?

A. No, sir.



(Testimony of Lowell L. Monsees.)

Q. King - Hoover Construction Company was billed [68] directly, were they not, for bills on the job?

A. That is correct.

Q. Under this construction contract?

A. Correct.

The Court: We will suspend until one-thirty.

(Thereupon the noon recess was taken.) [69]

#### Afternoon Session

June 18, 1954, 1:30 o'clock p.m.

Court convened pursuant to recess.

Appearances: Same as before.

The Court: You may proceed.

#### LOWELL L. MONSEES

resumed the stand and testified further as follows:

#### Cross Examination—(Continued)

Q. (By Mr. Stroud): Now, Mr. Monsees, just before the noon recess we were discussing the return of this principal amount of the loan Mr. Willis had made to the King-Hoover Construction Company, and I believe you had told us he had received back of the \$50,000 some \$45,000, is that correct?

A. Exactly forty-five.

Q. And I believe you told us further on August, some date in August of 1951, he received \$12,000, and that you testified further that in November, 1951, he received \$25,000, and then again later in the month of November, 1951, he received \$15,000. [70] Was that substantially what you said, sir?

(Testimony of Lowell L. Monsees.)

A. That is correct.

Q. Now, Mr. Monsees, in adding 12, 25, and 15 thousand dollars, I get \$52,000.

A. Well, that is correct. I grant you that.

Q. In other words, it is correct that Mr. Willis received \$52,000 instead of \$45,000 back?

A. In the interim, though, he had advanced \$41,041.99 on 9/12/51.

And he advanced \$958.01 on 9/17.

He advanced \$2,173.85 on 9/20.

He advanced \$626.12 on 9/22.

And that left a balance as of 9/22 he owed us, well, I would have to subtract here——

Q. That is all right. Let me ask you this, sir. What were these additional loans to the King-Hoover Construction Company made for?

A. For supplies. That was paid direct to the suppliers of material on the job.

Q. Did he take notes for these additional loans that he made to the King-Hoover Construction Company? A. No, sir.

Q. He did not? A. No, sir.

Q. It was just like the original \$50,000 loan? A. [71] just advanced them some more money?

A. The reason he had advanced more money was because we had no money available in the joint account. These bills had to be paid, and to keep the job going, I advanced these funds out of my own account.

Q. Wait a minute. Who advanced these amounts you have just enumerated, you or Mr. Willis?

(Testimony of Lowell L. Monsees.)

A. I did.

Q. You did?           A. Yes, sir.

Q. But your records there, and your testimony, as I understand it, sir, showed that Mr. Willis received back \$52,000?

A. Well, that is correct. I grant you that.

Q. Well, then, which is it? Did he receive \$45,000 back, or \$52,000, sir. I don't understand your testimony on that.

A. Well, would you like to look at the record here?

Q. No, I would like to have you tell me which figure is correct. Did he receive back \$45,000 or \$52,000, sir?

A. He received fifty-two, but this total of \$7800.00 that was advanced by me was paid to me by Mr. Willis out of his own funds.

Q. This was out of his own funds, now? [72]

A. I paid them out of my funds.

Q. Whose funds were they, yours, or his?

A. This \$7800 at the time it was spent was my funds, but I got it back from Mr. Willis with his personal check.

Q. Do I understand you to say he loaned the money to you to loan to the corporation?

A. Well, Mr. Willis' funds and mine are—when I handled Mr. Willis' funds, I handled them as my own. He trusts me and I trust him. There is such a thing as trust in this world yet. And that is one man that trusts me, and I trust him.

We commingled our financing, and we always gave

Testimony of Lowell L. Monsees.)

n accounting. However, our books are correct and can be audited at any time.

Q. Then do I understand it that the \$7800 that was advanced to the corporation, in addition to the \$50,000, was all from, all of it came from Mr. Willis to you? A. It did.

Q. Then it wasn't your funds?

A. Well, it was my debt. I advanced it.

Q. Well, did he loan to you this money for your personal purposes?

A. He merely repaid me for moneys that I had spent for his account.

Q. I see. When you recovered the \$7800, did you [73] credit Mr. Willis' account with that amount? A. Yes, sir.

Q. In other words, as I understand it, your funds and his were commingled, and you made additional loans from time to time in addition to the original \$50,000 loan to King-Hoover Construction Company, and as you were repaid yourself, you credited Mr. Willis with that amount, is that correct? Is that a correct statement of it?

A. Our books have always been — our book-keeper keeps our accounts for me. I don't quite follow your statement there, but our books are correct. My books and Mr. Willis' books balance.

We have an unpaid balance from this King-Hoover venture at this time of \$45,000. We have received \$45,000. We have an unpaid balance of \$55,000.

Q. What is the total amount you have loaned

(Testimony of Lowell L. Monsees.)  
to the King-Hoover Construction Company, and  
by you?

I will specify, what is the total amount which  
Mr. Willis has advanced to the King-Hoover Con-  
struction Company?

Mr. Andersen: If the Court please, this record  
here that Mr. Monsees has in his possession I think  
sets forth in detail the dates of these advances and  
dates of repayment. [74]

If it please the Court, if we could shorten this  
thing, we would be very happy to stipulate that  
that go into evidence as the true and correct ac-  
count of Mr. Willis with the King-Hoover Con-  
struction Company.

The Court: All right.

Q. (By Mr. Stroud): What was the total amount  
of money that Mr. Willis advanced to the King-  
Hoover Construction Company?

A. I will say it was \$57,800.

Q. And how much money did you advance to  
the King-Hoover Construction Company yourself,  
personally?

A. Well, that being——

The Court: Is that included?

The Witness: That is included.

The Court: All right, that settles that.

Mr. Stroud: All right.

Q. (By Mr. Stroud): What is the total amount  
that Mr. Willis has received back? Is it \$52,000?

A. He has received \$45,000.

Q. I see. And so those figures that show \$12,000,  
\$25,000, and \$15,000, are not correct, then?



Testimony of Lowell L. Monsees.)

A. They are correct. If you will follow this larger sheet down here, you will see that they are correct. [75]

Q. Well, then, he has received back more than \$5,000 of the total he has advanced, has he not?

A. I don't follow you.

Q. Do you know how much of the total amount of funds that Mr. Willis advanced to the corporation that he has received back?

A. Yes, sir.

Q. What amount is that? A. \$45,000.

Q. Now, then, Mr. Willis was not a party to the contract with the Government at Bellmont, Arizona, was he, sir?

Mr. Andersen: That has been asked and answered.

The Court: Yes.

Mr. Stroud: I think that has been gone into, your Honor. I wanted to follow that question up with this one.

Q. (By Mr. Stroud): I believe you told the revenue Agents when they talked with you about this matter in May of 1952 that Mr. Willis was not liable in any way, shape, or form under that contract? A. I don't recall that statement.

Q. You don't recall stating that?

A. No, sir. [76]

Q. That is a fact, is it not?

A. I don't know.

Q. You don't know whether he was or was not? He wasn't a party to it, but you don't know whe-



(Testimony of Lowell L. Monsees.)

ther he was or was not liable under the contract?

Mr. Andersen: May we have liable for what, your Honor?

The Court: For the performance of the construction contract, is that what you mean?

Mr. Stroud: I will phrase it this way.

Q. (By Mr. Stroud): Mr. Willis had no obligations or liabilities, or duties under that contract with the Government at Bellmont, Arizona, did he?

A. Well, I am sure he did. Without Mr. Willis, the contract wouldn't have been accepted by the Government, and without Mr. Willis and myself being active in the deal, the job couldn't have been completed, so I would say he had a definite responsibility there.

Q. Did the Government know that either you or Mr. Willis was involved in this matter?

A. The Commanding Officer up at Bellmont knew it.

Q. What duties did you or Mr. Willis have under that contract?

A. We furnished the financing and paid the bills and [77] saw that the job was completed.

Q. I understand that. But did you have any liability under that contract for the completion of it?

Mr. Chatwin: That calls for a conclusion. I object to it.

Mr. Stroud: We are perfectly willing if counsel, or if the plaintiffs will produce the contract, to let it speak for itself, and to introduce it into

estimony of Lowell L. Monsees.)

dence. And we have subpoenaed every person at we thought might have a copy of the original that contract, and we are unable to produce it. They are now attempting to by secondary evidence and conclusions of this witness to try to get the information on that contract in the record.

Mr. Andersen: If the Court please, that contract or a copy of it, probably a dozen copies of were given to the Army at the time it was prepared, if I know them, and I think the United States Government has in its possession a copy of that contract. We have tried and failed to find a copy of it.

The Court: It could be stipulated, couldn't it, that the contract was between the Government and these contractors?

Mr. Chatwin: I believe it is admitted in the [3] Government's answer that the contract existed, but we haven't seen it.

The Court: That is the conclusion you have reached from what you have heard?

Mr. Stroud: I think that is correct. All we want to point out is that Mr. Willis was not a party to the contract, not privy to the contract, and had under that contract no rights or duties.

The Court: I have that in mind right at this instant.

Mr. Chatwin: To that we will stipulate, your honor.

The Court: All right.

(Testimony of Lowell L. Monsees.)

Mr. Stroud: I will withdraw that last question, your Honor.

Q. (By Mr. Stroud): Mr. Monsees, one or two more questions. You testified this morning, I believe, sir, that the check from the Government on this Government contract at Bellmont came directly to the King-Hoover Construction Company, and that when they received it, it was then deposited in the bank account here in Phoenix?

A. That is correct.

Q. How do you know what they did with that check, or whether they deposited that check, or when that check came through? [79]

A. I was in direct contact with their office, and with the Army office. I knew when those checks were coming through.

Q. They told you that the check was on the way, didn't they?      A. That is right.

Q. And then Mr. Hoover signed the check and deposited it in the bank account?

A. He brought the check, or sent it right to my office, and I deposited the check.

Q. You had no control over that check prior to the time that you received it, did you, sir?

A. No.

Q. Now, a moment ago, before lunch, I believe you testified that the Revenue Agents had agreed with you, or had made some statements to you that they would let this fund of money owing to the King-Hoover Construction Company come on

(Testimony of Lowell L. Monsees.)

rough so that you as party here could get your  
ends on it, is that correct?

A. That is right.

Q. Isn't it a fact, Mr. Monsees, that that state-  
ment is not true at all? And that, in fact, the Rev-  
ue Agents and the Internal Revenue Service  
made a levy on you for money?

A. I still stand exactly like I said this morning.

Q] And I will be very happy to elaborate on it,  
you would like.

Q. Can you tell His Honor approximately what  
the date of that conversation with the Revenue  
agents was?

A. I can't recall the exact date. It was either  
May or June.

Q. Of what year, sir? A. 1951.

Q. Of 1951? A. Yes, sir.

Q. Do you recall being levied on by the Internal  
Revenue Service for a certain sum of money?

A. Yes, sir.

Q. In approximately October of 1951?

A. Yes, sir. Would you like for me to elaborate  
on that conversation a little bit? I would be glad to.

Q. Yes. A. I was told——

Q. Who was the conversation with?

A. With Mr. Stanford.

Q. Who else was present?

A. Mr. McRae.

Q. Who else was present?

A. I don't recall whether Mr. Berger was in

(Testimony of Lowell L. Monsees.)

that particular conference or not. But I was told—— [81]

Q. Where did that conversation take place?

A. Up in the Internal Revenue office, at Mr. McRae's desk.

Q. And what was the approximate date of this conversation?

A. I don't recall the exact date. But it was pertaining to this levy, and it was mostly pertaining to releasing these funds, so that we could pay all the obligations and pay the bill that was due to the Internal Revenue Department.

Q. There was an obligation outstanding at that time? A. Sir?

Q. There was an obligation outstanding in taxes to the Internal Revenue Service?

A. That is correct.

Q. And you don't recall when that conversation took place?

A. Not the exact date, no.

Mr. Chatwin: If the Court please, the question has been asked and answered several times. He said in May or June.

Mr. Stroud: All right. That is all.

### Redirect Examination

Q. (By Mr. Andersen): Would you go ahead and describe [82] this conversation you were just speaking of Mr. Monsees, in a little greater detail?

A. Yes, sir. We had been behind for quite some



(Testimony of Lowell L. Monsees.)

me about paying our bills, and about getting this job completed.

That was the reason why I had to make definite advances to the subcontractors and to the material suppliers.

The Internal Revenue was quite anxious to get their hands on any funds belonging to King-Hoover at they could, and for which I don't blame them for that.

But the thing I do object to is this, and that is that I was doing my level best to get this work out. I knew there was funds available to satisfy all claims against Mr. Willis and the King-Hoover job at Bellmont.

I talked to these boys, and I talked to Mr. McRae about it. I went to Mr. McRae for his advice on it, and it was understood that this levy was prepared ready to serve, but they assured me that they would not file it, and would let this money come through its normal channel.

That would be the quickest way to satisfy all of the obligations to the job, and for them to get their money cleared up on this job from King-Hoover. And had it not been that this was going to be the procedure, I wouldn't have stood by and let that check go the route that it did go. I could have stopped it, but I took those gentlemen at their word, that they would do just that, and I assumed that they took me at my word.

When the check didn't come through, I called Los Angeles office, and they told me that the check

(Testimony of Lowell L. Monsees.)

had come to Bellmont, the check had gone to Bellmont. I called Bellmont, and they told me up at that office that it had been levied on and taken by the Internal Revenue Department.

And furthermore, at the very time that this promise was given me that it wouldn't be levied upon, the levy had already been filed, and I didn't know anything about it.

That is all I have got to say.

Q. Did you talk to Mr. Berger and Mr. Stanford after you had found out that they had taken the money?      A. Yes, I did.

Q. Can you tell where and when that conversation took place?

Q. In their office.

Q. Would you relate the conversation, as near as you can remember? [84]

A. Well, pardon me, pardon the expression, they crawfished and said there was nothing they could do about it.

Q. Did they tell you who made the levy, or who took the funds?

A. Yes. You mean the individual?

Q. Yes.      A. I don't know that.

Q. Did they tell you what they had done with the funds?

A. They said they sent them directly to Washington, D.C. They didn't keep funds in their office up here.

Q. Did they tell you that they had applied the fund in the payment of any particular payroll

(testimony of Lowell L. Monsees.)

Q. Does, or debts of King-Hoover Construction Company?  
A. I don't recall that.

Q. Did the joint venture ever pay the Collector Internal Revenue any funds?

A. Yes, they did.

Q. I hand you Plaintiffs' Exhibit 2 for identification and ask you if you have ever seen this document before?  
A. Yes, sir.

Q. That is the check to which you have reference?  
A. Yes, sir. [85]

Mr. Andersen: We offer in evidence Plaintiffs' Exhibit 2 for identification.

Mr. Stroud: No objection.

The Clerk: Plaintiffs' Exhibit 2 in evidence.

(Said cancelled check referred to was received in evidence and marked Plaintiffs' Exhibit 2.)

Mr. Andersen: May this be marked for identification?

The Clerk: Plaintiffs' Exhibit 7 for identification.

(Said cancelled checks were marked as Plaintiffs' Exhibit 7 for identification.)

Q. (By Mr. Andersen): Mr. Monsees, did the King-Hoover Construction Company ever pay the Employment Security Commission of Arizona any taxes for Unemployment Compensation?

A. Yes, sir, it did.

Q. And did they ever pay the Industrial Commission of Arizona any Industrial Commission insurance?  
A. Yes, sir.

(Testimony of Lowell L. Monsees.)

Q. I hand you Plaintiffs' Exhibit 7 for identification, and ask you if you recognize those documents? A. Yes, sir.

Q. And what are they?

A. Payment for taxes and withholding taxes and payroll taxes.

Mr. Andersen: We offer in evidence Plaintiffs [86] Exhibit 7 for identification?

Mr. Stroud: If your Honor please, we think the checks payable to the Industrial Commission of Arizona are irrelevant to the issues here. We have no objection to them.

The Court: It seems so to me. What do you have in mind there?

Mr. Andersen: If the Court please, it is just for the purpose of showing the joint venture did meet its obligations, as far as employment taxes were concerned.

That is the only purpose it serves. As far as the Employment Security Commission of Arizona is concerned, I think it is quite obvious why we would want in evidence something showing the amount paid to that State subdivision.

The Court: It may be received subject to the objection.

The Clerk: Plaintiffs' Exhibit 7 in evidence.

(Said cancelled checks referred to received in evidence and marked as Plaintiffs' Exhibit 7.)

Q. (By Mr. Andersen): Mr. Monsees, Mr. Stroud has asked you questions about these addi

estimony of Lowell L. Monsees.)

nal advances, which I believe you stated to be \$300, which were made by you on behalf of Mr. Willis? [87] A. Right.

Q. When these advances were made, did you have any agreement with the King-Hoover Construction Company regarding security for repayment of these advances?

A. Nothing in writing. We had an oral agreement with Mr. Hoover.

He come into my office and says, "We are over the barrel here. We have got to get this thing completed some way," and the only way I knew to get it done was to buy the material, and I agreed to advance the money and to get it back when the next check come through from the Government on partial payment.

Q. In other words, he agreed with you that the proceeds from the contract would be the security for the repayment of this seventy-eight hundred?

A. That is right.

Q. And that is the understanding that you had with the original fifty thousand, too, was it not?

A. That is correct, yes, sir.

Q. Mr. Monsees, you were speaking here about the account which you had with Mr. Hoover's funds. Is it not true that all of the proceeds from the money were deposited in this bank account over which you had control?

A. That is correct, all except the last check at [88] we didn't get.



(Testimony of Lowell L. Monsees.)

The Court: What was the amount of the last check?

The Witness: \$12,280, if I am not mistaken.

The Court: That was the final payment on completion?

The Witness: Yes, sir. That was the one that was levied upon.

The Court: I wondered what the amount was.

Mr. Andersen: I believe the complaint, your Honor, shows that amount to be \$12,278.00 and some cents.

The Court: That is all right. The witness has answered the question.

Q. (By Mr. Andersen): You were asked about the auditor for the company. Who selected the auditor for the joint venture books? A. I did.

Q. And who was that?

A. Kent Pomeroy.

Q. Did Mr. Pomeroy prepare statements reflecting profit from this joint venture operation?

A. Yes, sir.

Q. And he did prepare a final balance sheet on it, did he? A. Yes, sir.

Q. And did he prepare a summary of all the wages paid by the joint venture on this Bellmont job? [89]

A. Yes, sir.

Q. I hand you Plaintiffs' Exhibit 3 for identification, and ask you if you recognize that document? A. Yes, sir.

Q. Would you state what it is, please?

(Testimony of Lowell L. Monsees.)

A. Well, it is a claim.

Q. Claim for refund? A. For refund.

Q. With supporting schedule?

A. That is right.

Q. And to your knowledge, was the original of this claim filed with the Federal Government?

A. That is right.

Mr. Andersen: We offer in evidence Plaintiffs' Exhibit 3 for identification.

Mr. Stroud: Your Honor, we object to the introduction of Plaintiffs' Exhibit 3 into the evidence, for the reason that it is a self-serving statement.

The Court: I agree with that. It is merely evidence that a claim was filed. I will admit it in evidence.

Mr. Stroud: We will admit the claim was filed.

The Court: Evidently there is a summary of certain records there. The records aren't before the Court. [90]

Mr. Stroud: The records aren't before the Court, and we have a right to cross-examine anybody that prepared them. It is not the best evidence.

The Court: Yes.

Mr. Andersen: I think that is all at this time, Your Honor.

Mr. Stroud: One more question, Mr. Monsees.

#### Recross Examination

Q. (By Mr. Stroud): You stated a moment ago during redirect examination that you could have stopped

(Testimony of Lowell L. Monsees.)

the checks. I assume you meant the \$12,000 owed from the Government to King-Hoover Construction Company?

A. I don't think I said I could stop the check. I think I said I could have taken other recourse. I could have taken any action providing I wasn't given to understand that this was going to come through to conclusion, as we had agreed to at that time.

Q. You don't mean to state a moment ago that you could have stopped the payment of this check, did you, sir?

A. I don't think I said that, did I?

Q. I believe you did, sir. Did you mean to imply or state that you could have stopped the payment of this [91] check to King-Hoover Construction Company?

A. No, I don't think I could have stopped payment of the check, but what I had in mind, I had other recourse. I could have held up payment of it at that time until this thing was settled, before anybody got the money, is what I meant.

Q. You could have held up payment of this check?

A. Yes, I am sure I could have.

Q. That is your conclusion, that you think you could have held up payment? Actually, you didn't have any control over the payment of a check by the United States Government on a construction job to the King-Hoover Construction Company?

A. Well, that, of course, is a legal matter, and

testimony of Lowell L. Monsees.)

am not an attorney. I don't know much about law.

Q. And that was just your conclusion that you thought you could have stopped this?

A. Let us put it this way. I could have taken steps to keep this money out of the Internal Revenue Department's hands had I known it was not coming to conclusion as planned.

Q. But your answer to my question, you had no control over that check, or the payment to the King-Hoover Construction Company by the United States Government, did you? [92]

A. Not after it was issued, no.

Q. Or before?

A. Before a check is issued on a job of that kind, it has to be approved.

The voucher, no, not the voucher, the claim for payment that is sent to them has to be approved. When a Government job like that is in progress, the claim for payment has to be made up on the spot, has to be approved by the head of the local finance depot, and then forwarded into the Los Angeles office for payment.

That is the way these were handled up there.

My step there would be to have kept that from being approved prior to the time it went to the past.

Q. You mean you would have asked someone not to approve that on the Government level?

A. That is correct.

Q. Of course, you do not know whether they would or would not have?

(Testimony of Lowell L. Monsees.)

A. I am quite sure of that.

Q. What makes you think that?

A. Because I would, I was in pretty close contact with that job up there.

Q. You had nothing to do with that contract, as I understood your testimony? That was strictly between King-Hoover and the Government? [93]

A. I was in pretty close contact with that job, and the man in charge of it.

Mr. Andersen: I object.

The Court: What difference does it make what wasn't done. It is of no interest to me.

Mr. Stroud: I think that is right. We take the position they had no right or authority.

The Court: I don't know whether they did or didn't, but I am not interested.

Q. (By Mr. Stroud): Do you have any pecuniary interest in this lawsuit, Mr. Monsees?

A. I don't know what pecuniary means.

Q. Do you have any money interest? Do you stand to gain anything from the lawsuit?

A. No, sir, I don't.

Q. You won't get any of this money in the eventuality your side wins, will you?

A. No, sir.

Mr. Stroud: All right. That is all, thank you.

The Witness: I would be glad to state my position in the case, if you would like.

The Court: Oh, I am not interested, unless counsel is.



estimony of Lowell L. Monsees.)

Mr. Andersen: I think that is all of this witness [94] at this time, your Honor.

The Court: All right, that is all.

(Witness excused.)

Mr. Andersen: I call Mr. Kent Pomeroy.

### KENT POMEROY

called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

#### Direct Examination

Q. (By Mr. Andersen): Will you state your name, please? A. Kent Pomeroy.

Q. What is your occupation, Mr. Pomeroy?

A. Accountant.

Q. And with whom are you associated?

A. Cuthbert Johnson & Company.

Q. Are they certified public accountants here in Phoenix?

A. They are.

Q. Were you so associated during 1951 and 1952?

A. Yes, sir.

Q. Are you acquainted with Mr. Lowell Monsees?

A. Yes, sir.

Q. And you are acquainted with the officers of the King-Hoover Construction Company? [95]

A. Yes, sir.

Q. Were you employed to perform, that is, was the firm of Cuthbert and Johnson employed to perform an audit of the books of a joint venture between this individual and this corporation?

A. On a modified basis, yes, sir.

(Testimony of Kent Pomeroy.)

Q. Would you explain that, sir?

A. Could I refer to the report you have?

Q. Just state if you were employed to prepare a report.

A. We were employed to examine the earnings records of King-Hoover Construction Company, and to also go over the joint venture records and determine what their operation had been, the results of their operation.

Q. When you speak of earnings records, what do you mean?

A. Individual earnings records of employees.

Q. Of employees of the joint venture?

A. That is correct.

Q. Did you under the supervision of Cuthbert Johnson and Company investigate the books and records of this joint venture?

A. Yes, sir.

Q. And you prepared therefrom a rather detailed report, did you not? [96]

A. Yes, sir.

Q. Could you tell the Court what records you looked at?

A. Well, we looked at the bank statements, cancelled checks, check books, deposit slips, payroll record, vouchers, and their journal.

Q. Is that a general journal?

A. It was a combined cash journal, general journal.

Q. The journal showed both receipts and disbursements, did it?

A. Yes, sir.

Q. Arranged in chronological order?

A. Yes, sir.

estimony of Kent Pomeroy.)

Q. Was there a separate bank statement kept for  
s joint venture operation? A. Yes, sir.

Q. Were there separate earnings, payroll earn-  
s records kept for this operation?

A. There were separate payroll records, regis-  
s, kept for the King-Hoover joint venture books,  
arate from King-Hoover Company. In other  
rds, there was two payroll registers.

Q. You state you prepared a report, did you?

A. Yes, sir.

Q. I hand you here Plaintiffs' Exhibit 3 for  
] identification, and ask you if you recognize  
t? A. Yes, sir.

Q. Would you state what it is, please?

A. This is a claim for a refund for overpay-  
nt of taxes by the joint venture?

Q. And did you prepare that under the direction  
Cuthbert and Johnson? A. Yes, sir.

Q. You prepared all the supporting schedules?

A. All the supporting schedules, with the excep-  
n of these minutes, resolutions that are attached.

Q. Can you state of your own knowledge that  
y correctly reflect the balance sheet of the King-  
over and J. E. Willis joint venture as of the  
te indicated, and results of the operations for the  
riod covered by the report? A. Yes, sir.

Q. And can you state under oath that the earn-  
gs records as revealed by the reports is correct  
d accurate as taken from the records given you  
being those of the joint venture?

(Testimony of Kent Pomeroy.)

A. Yes, sir.

Mr. Andersen: We offer again in evidence, your Honor, Plaintiffs' Exhibit 3 for identification.

Mr. Stroud: We renew our objection. [98]

The Court: It was received for a limited purpose the first time, to show that the claim had been filed.

Mr. Andersen: We offer it also, your Honor, in the capacity of showing the obligation of the joint venture.

The Court: All right, it may be received for that purpose, subject to the objection. I don't know how that will be finally determined.

Mr. Stroud: We renew our same objection, if your Honor please.

The Court: All right. I may be wrong on that.

Mr. Stroud: It is a take-off of a preparation of a summary of some records.

The Court: I know. Ordinarily, when a record is summarized it is in Court for the opposite party to examine.

Mr. Stroud: Yes, sir.

The Court: But we don't have *that*.

The Clerk: Plaintiffs' Exhibit 3 in evidence.

(Said Claim for Refund was received in evidence and marked Plaintiffs' Exhibit 3.)

Q. (By Mr. Andersen): Mr. Pomeroy, did you have any conversation with either Mr. Berger or Mr. Stanford about these reports that you had prepared? A. Yes, sir. [99]

testimony of Kent Pomeroy.)

Q. Could you state the date of that conversation approximately?

A. I couldn't state the exact date.

Q. Approximately?

A. It was some time prior to filing of that claim.

Q. Could you state the substance of your conversation?

A. Yes, sir. I discussed the matter and asked them in which way they would like to have this presented to them so that they would have all the information available, so that they could make a fair and impartial decision, and it was in the spirit of cooperation to give them the necessary information, they realizing that at that time we had all the records available, and we could give them any information they needed, or they could come and look at the records if they so desired, so the claim was prepared according to their suggestion for the information that they would need.

Mr. Stroud: Your Honor, we have the original of this somewhere. I can't put my finger on it right now. We will have no objection to the offering of that, as far as its being a copy of the original. We only have some——

The Court: I don't know what you are talking about. [100]

Mr. Stroud: It hasn't been identified yet.

Mr. Andersen: Will you mark this as Plaintiffs' Exhibit 8 for identification?

The Clerk: Plaintiffs' Exhibit 8 for identification.



(Testimony of Kent Pomeroy.)

(Said copy of letter of 5/22/52 was marked for identification as Plaintiffs' Exhibit Number 8.)

Q. (By Mr. Andersen): Did you have any correspondence with either Mr. Berger or Mr. Stanford regarding this report, Mr. Pomeroy?

A. Only just conversations.

Q. I hand you Plaintiffs' Exhibit 8 for identification, and ask you if you recognize that?

A. Yes, I do.

Q. And will you state what it is, please?

A. It is a letter addressed to the Collector of Internal Revenue's office, attention Mr. Berger.

Q. That has a supporting schedule with it, does it?

A. Yes, sir.

Q. Did you dictate that letter and prepare that schedule?

A. I prepared the schedule, and the letter was sent by Wesley Johnson.

Q. Did you take the information contained in that schedule from the books and records of the joint venture? [101]

A. Yes, sir.

Q. And you can tell under oath, you can testify under oath that the information contained thereon is accurate, can you?

A. Yes, sir.

Mr. Andersen: We offer in evidence Plaintiffs' Exhibit 8 for identification.

Mr. Stroud: We object to it for the reason it is a take-off from records the originals of which are not here, and we do not have an opportunity

estimony of Kent Pomeroy.)

see them, although we have subpoenaed. I think it not the best evidence.

The Court: It will be received subject to your objection.

The Clerk: Plaintiffs' Exhibit 8 in evidence.

(Said letter of 5/22/52 was received in evidence and marked Plaintiffs' Exhibit 8.)

Mr. Andersen: May this be marked for identification?

The Clerk: Plaintiffs' Exhibit 9 for identification.

(Said work sheets were marked as Plaintiffs' Exhibit 9 for identification.)

Q. (By Mr. Andersen): Did you prepare detailed schedules of the earnings record of the King-Hoover Construction Company and the joint venture, Mr. Pomeroy? [102]

A. Yes, sir.

Q. And you prepared those on working papers, is that right?

A. Yes, sir.

Q. I hand you Plaintiffs' Exhibit 9 for identification and ask you if those are the schedules which you speak?

A. These weren't entirely worked on by me, but that particular phase of it was not, sir.

Q. Was that done under your supervision?

A. Yes, sir. This is not all my handwriting here.

Q. But it was done under your supervision?

A. That is right.

Q. And these records here do support in detail

(Testimony of Kent Pomeroy.)

the Plaintiffs' Exhibit 8 which you have just identified?      A. That is right, they do.

Mr. Andersen: We offer in evidence, your Honor, Plaintiffs' Exhibit 9 for identification.

Mr. Stroud: May I see it?

Q. (By Mr. Andersen): Do you know where the original payroll records of this company are?

A. No.

Q. You did have them in your possession at the time you prepared these reports, did you?

A. I did. [103]

Q. Who did you deliver them to when you got through?

A. I don't recall who came and got them. I really don't. They were in the office quite a while, and I don't know who finally came and picked them up.

Mr. Stroud: We object to Plaintiffs' Exhibit 9 for the reason it is a take-off on some records, the originals of which are not here, not in Court, and I think the witness also testified that he didn't personally do it.

The Court: Yes.

Mr. Stroud: I don't believe it is the best evidence.

Mr. Andersen: I think, your Honor, he testified it was done under his supervision.

The Court: What does that mean?

Mr. Andersen: I beg your pardon, sir?

The Court: What does that mean? Somebody else copied them from the record? He didn't stand

estimony of Kent Pomeroy.)

re and look over his shoulder while he copied it.  
Mr. Andersen: Mr. Pomeroy has testified that these records are correct, and I think most of the work done in Accountants' offices is done by personnel underneath.

The Court: I know. But usually the books are available. You don't have to take the Accountant's word for anything. You may have your own Accountant.

Mr. Andersen: We have attempted to find these books, [104] too, and are unsuccessful.

The Court: Is this company still in existence?

Mr. Andersen: No, it has been defunct for some years.

The Court: Hence this lawsuit?

Mr. Andersen: Yes, your Honor. Would your Honor rule on the admissibility?

The Court: That only supports the other exhibit, doesn't it?

Mr. Andersen: Yes.

The Court: I don't believe I will admit that. The other is in evidence.

Mr. Andersen: I think that is all.

#### Cross Examination

Q. (By Mr. Stroud): Mr. Pomeroy, I believe you had a conversation with one or two of the Revenue Agents concerning the books and records of King-Hoover Construction Company, and the question at that time was asked as to whether you could make a breakdown between the King-Hoover Con-

(Testimony of Kent Pomeroy.)

struction Company payroll records and the specific job which King-Hoover Construction Company undertook in Bellmont, Arizona, is that correct, sir?

A. I can't recall any such conversations. However, [105] they may have gathered from this fact that there was one earnings record, there was one earnings record for each employee.

However, there were two payroll journals.

Q. And those earnings records were under the King-Hoover Construction Company's books, were they not?

A. They were detailed records to which each employee's earnings were brought together in one place for making the Social Security reports.

Q. Yes.

A. Thus if an employee who reached \$33,000, if you put it in two places, he could go up to \$3,000 in both places before he would be exempt from taxes, and it would cause confusion. So there had to be one earnings record for each employee, although there were two payroll journals, one for the joint venture, and one for the corporation.

Q. Do you recall telling the Revenue Agents on that time and occasion that the records were so commingled that you couldn't tell the construction job at Bellmont from any of the other jobs?

A. Absolutely not.

Q. You don't recall saying that?

A. No, sir.

Q. A while ago you were answering questions, and you [106] were, I suppose, assuming that this



testimony of Kent Pomeroy.)

is a joint venture. You don't know, of your own knowledge, whether this was a partnership or a joint venture, other than what somebody told you, you, Mr. Pomeroy?

A. Well, I know at the time they started to go into this deal that I was told that they were going to have a joint venture.

Q. You were told that, were you not?

A. That is right.

Q. And that is the basis of your information and knowledge that this so-called financing relationship was a joint venture partnership, was it not?

A. Well, it had all the other——

Q. I ask you, sir, if that is the basis of your knowledge?

A. I only know what I am told.

Mr. Stroud: All right. I don't know that it is necessary to make a motion to strike his conclusion that this was a joint venture or partnership. I think that is the ultimate question for the Court.

The Court: The Court will decide it.

Mr. Stroud: Yes.

Q. (By Mr. Stroud): Now, you testified that you were the accountant for the King-Hoover Construction Company and prepared [106-A] some of these schedules and take-offs, is that correct?

A. Our firm, Cuthbert Johnson and Company, was employed as the accountants, and I am employed by the Cuthbert Johnson Company.

Q. Yes, sir, and you were employed by the

(Testimony of Kent Pomeroy.)

King-Hoover Construction Company, is that correct? A. Not as their employee, no.

Q. Who were you employed by?

A. By Cuthbert Johnson Company, CPA firm.

Q. I understand who you are employed by, Mr. Pomeroy. A. Yes.

Q. I say, the firm was employed by the King-Hoover Construction Company?

A. That is right.

Q. Now, it is true, is it not, sir, that at no time ever from 1950 up until today, has there been any copartnership Federal income tax returns ever filed for any so-called joint venture or partnership, isn't that true?

A. Not to my knowledge, there hasn't been any.

Q. Have not been any filed?

A. I don't know that there has or there hasn't.

Q. You didn't do it if there was one?

A. I didn't do it. [107]

Q. Sir?

A. No, sir, I didn't file any.

Q. Now, did you have anything to do with preparing the payroll tax returns. I think they have been introduced as Plaintiffs' Exhibit Number 4.

Did you have anything to do with the preparation of the Employers Quarterly Federal Tax Return?

A. Not the original ones, no.

Q. Do you know of your own knowledge whether these were the Employers Quarterly Federal Tax Returns filed during this period of time?

A. May I say something to clarify this. I don't

testimony of Kent Pomeroy.)

Q. Now who this is signed by. I recognize this signature as their office manager.

A. He was the office manager of the King-Hoover Construction Company, is that right?

A. That is right.

Q. Sterling Page. In fact, all those are signed by an officer of the King-Hoover Construction Company, are they not?

A. Yes, sir. Now, we did amend these, and corrected them.

Q. May I ask you this, sir. The party reporting, making this tax return, is the King-Hoover Construction Company, is it not? [108]

A. Yes, sir, that is right.

Q. The corporation. There is no mention on these returns anywhere about any partnership or joint venture, is there?

A. No, sir.

Q. Did you ever see the books of account of the King-Hoover Construction Company yourself?

A. Yes, sir.

Q. Will you tell His Honor whether there was or was not a capital account outstanding in the name of Mr. or Mrs. J. E. Willis?

A. No. I don't think there was. To my knowledge of the books, I never saw such an account.

Q. Do you know how this advancement, or loan, of \$50,000 was set up on these books which aren't here in Court today?

A. They were set into a separate joint venture account set of books.

(Testimony of Kent Pomeroy.)

Q. Sir?

A. They were set up as a separate set of books in a joint venture account.

Q. Do you know how the money which was advanced to this corporation by Mr. and/or Mrs. Willis was set up or carried as an item on the accounting books of the King-Hoover Construction Company? Do you know of your own [109] knowledge? A. It was deposited in the bank.

Q. I understand that the money was deposited in the bank, Mr. Pomeroy. But my question is, do you know how this advance or loan was set up on the books of the King-Hoover Construction Company, sir?

A. I don't know how the original entry, I don't recall how the original entry was set up, although when we came in on the picture it was at the end. And we were just trying to find out what the operation was, and how much was due the various creditors during the time.

Q. You don't know how that was set up or carried on these books of the King-Hoover Construction Company?

A. It wasn't set up as a capital account.

Q. No, but the King-Hoover Construction Company would have had to set this item up on their books, they would have had to account for it?

A. They probably set it up under the name of Willis. I don't recall just how they did set it up.

Q. You said they probably would, but you don't know? You didn't see it?

estimony of Kent Pomeroy.)

A. Well, I can't recall it.

Q. You don't recall how it was set up on their books?

A. No.

Q. You didn't obtain or ask for a separate account, [110] or separate account number for the joint venture from the Internal Revenue Service, did you, Mr. Pomeroy?

A. I didn't have anything to do with that, because that was handled by their own personnel.

Q. You mean King-Hoover?

A. That is right.

Q. Handled that?

A. Yes.

Q. They made the payrolls and paid the bills, didn't they not?

A. Bills were paid by Mr. Monsees, and under his supervision.

Q. Now, as a matter of fact, the bills came to the King-Hoover Construction Company, did they not?

A. I believe they did.

Q. The bills were in the name of the King-Hoover Construction Company, were they not?

A. There may have been some that weren't, or back and forth. There might have been some back and forth. I don't recall. I wouldn't want to say definitely one way or the other on that.

Q. Mr. Monsees merely co-signed the checks along with Mr. Hoover, or some other officer of the King-Hoover Construction Company, isn't that correct?

A. He had the control signature. [111]

Q. It had to have two signatures on them?

A. That is right.

Q. And one of them was one of the officers of



(Testimony of Kent Pomeroy.)

the King-Hoover Construction Company, was it not? A. That is right.

Q. The bank account was in the name of the King-Hoover Construction Company, was it not?

A. I believe it had some other designation on it.

Q. Did you ever see it?

A. Yes, I did. But I can't recall what it was. I think it was called Railroad Account.

Q. King-Hoover Construction Company Railroad Account, was that the way it was denominated?

A. I am not altogether sure about that, but it had some particular title to it.

Q. There were no payments or salary of any kind made to Mr. Willis by the King-Hoover Construction Company, were there, Mr. Pomeroy?

A. None that I can recall. I don't believe we made any salary payment to him.

Mr. Stroud: I believe that is all. Thank you, sir.

### Redirect Examination

Q. (By Mr. Andersen): Just a question or two. As a matter of fact, [112] weren't there actually two bank accounts which you made your report from? In other words, you made your report from two accounts?

A. Yes, there was. I believe there was one that was carried under—come to think about it, I think that they carried one under that name, and they carried one under Lowell Monsees' name. I am not sure of that, but it seems to me it was.

testimony of Kent Pomeroy.)

Mr. Stroud: If the witness is not sure of his answer, we request he not answer about something he is not sure about.

Mr. Andersen: He is testifying to his own recollection, your Honor.

The Court: That is all anyone can testify to.

The Witness: It is a long time.

Q. (By Mr. Andersen): Do you know whether or not there were two signatures required on the checks that were drawn on the account of Mr. Lowell Monsees?

A. No, but I don't think there would be, because it was in his name.

Q. All right. Referring to this question Mr. Stroud asked you about the capital account. Was there a ledger, a general ledger kept? [113]

A. No.

Q. For this concern?

A. No general ledger.

Q. That is, you took your records from these journals which you have spoken of from the payroll records, the bank statements, and the cancelled checks, and the vouchers?

A. That is correct.

Q. And there was no general ledger set up as such?

A. That is correct, no general ledger.

Q. And the only place that a capital account could appear would be in a general ledger, is that true?

A. That is right.

Q. Would you tell the Court how the payroll

(Testimony of Kent Pomeroy.)

fund was paid? In other words, was there a revolving fund for the payroll?

A. It was handled on a revolving fund basis, because of the employees of this company, this joint venture, were working on other jobs, see, but there were two payroll records kept, so whenever the payroll on this job, joint venture job, amounted to a certain sum of money, Mr. Monsees would give him that amount of money to meet the checks, so it was handled on a revolving fund basis.

Q. Do you mean individual checks were drawn, would you say, from the King-Hoover bank account? [114]

A. That is right.

Q. But they each time presented a bill to Mr. Monsees specifying the bill for the employees that worked on the joint venture job?

A. That is right.

Mr. Stroud: If your Honor please, we object to somebody presenting a bill to somebody. I don't know that there is any evidence on that here.

Mr. Andersen: We are just trying to get a description of the operation, your Honor.

I believe that is all.

The Court: That is all, Mr. Pomeroy.

(Witness excused.)

Mr. Andersen: I call Mr. Sam Berger.

### SAM BERGER

called as a witness in behalf of the plaintiffs, having been first duly sworn, testified as follows:

testimony of Sam Berger.)

Direct Examination

Q. (By Mr. Andersen): State your name, please?  
A. My name is Sam Berger.

Q. Where do you live, Mr. Berger?

A. 2106 West Avalon Drive.

Q. In Phoenix? [115]     A. In Phoenix.

Q. What is your occupation?

A. I am Chief of the Accounts Section at the Internal Director of Internal Revenue office.

Q. Were you so employed throughout 1950 and 1951?

A. No. At that time I was employed as a Deputy Collector.

Q. Under whose supervision did you work at that time?

A. At that time I was under the supervision of Mr. Sisson, who was chief of the Field Division.

Q. And Mr. William P. Stuart was over him, is he?

A. Yes, sir, he was the Collector.

Q. What were your duties in that capacity, Mr. Berger?

A. As Deputy Collector, I was required to secure delinquent returns. I was required to make assessments, collections. I was required to audit books and records.

I was required to assist and aid taxpayers in preparing returns.

I was required to advise taxpayers regarding their tax problems.

(Testimony of Sam Berger.)

Q. Was it part of your job to make levies for delinquent taxes?

A. During my work in the collection of warrants, I [116] was required to levy for the collection of taxes.

Q. And to make demand for payment, were you?      A. Yes, sir.

Q. When did you first become acquainted, or did you become acquainted with Mr. Lowell Monsees here?

A. I first became acquainted with Mr. Lowell Monsees on May 23, 1952.

Q. You hadn't talked to him before that date?

A. Not to my knowledge.

Q. Do you mean 1952?      A. 1952.

Q. And you hadn't seen him after that?

A. Well, sir, that is a rather hard statement to answer. I may have seen the gentleman in the office while he was visiting with some other Deputy Collector, or while he was in the office, but I don't recall any prior contact to May 23, 1952.

Q. Were you assigned to collect delinquent taxes for the King-Hoover Construction Company?

A. Yes, as a member of the Seizure and Sales Squad I did have that file for some period.

Q. When did you commence to work on that?

A. I would say it was early. It was after the filing. In 1952.

Q. You didn't work on it in 1951 at all? [117]

A. No, sir, in 1951, I was assigned to the Field Audit of income tax returns.



estimony of Sam Berger.)

Q. Did you ever talk to Mr. Monsees about this delinquent account?

A. During the period in which I held the warranties for distraint in the name of King-Hoover, I never had any reason to contact Mr. Monsees.

Q. Well, did you ever contact him?

A. Yes, I did, on May 23, 1952.

Q. Could you state the substance of the conversation you had with him at that time?

A. Yes. The Assistant Commissioner, one of the Assistant Commissioners in Washington requested that a Collection Officer contact Mr. Monsees and ask him certain questions regarding the operations of the joint venture alleged to be between Mr. Willis and King-Hoover.

And Mr. Stanford and I went to Mr. Monsees' office. It was in the morning of May 23, 1952.

Do you wish me to go on as to the nature of the conversation or would you rather question me on it?

Q. I think that is enough at this point, Mr. Berger.

Mr. Berger, do you know the dates that the levies, or rather, the demand for payment was made on King-Hoover Construction Company for delinquent payroll taxes, covering the last quarter of 1950 and the first [118] three quarters of 1951?

A. I have that information in my possession.

Q. Could I have that?

A. However, I would like to explain prior to

—

Q. Go right ahead, Mr. Berger.

(Testimony of Sam Berger.)

A. These assessment lists I have are in my hands for safekeeping, and if they are to be introduced as evidence, I would appreciate that photostats be introduced rather than the original assessment lists, in view of the fact that these lists are used for other purposes continually.

Mr. Andersen: That request will have to be directed to the discretion of the Court.

The Court: Do you have photostats there?

The Witness: No, sir, we didn't have time to secure the photostats.

The Court: All right, they may be introduced and photostats substituted. We will see that your records are not lost.

The Witness: All right. What was the quarter you were interested in, sir?

Q. (By Mr. Andersen): For the last quarter of 1950, and the first three quarters of 1951.

A. We have eleven assessment lists here. If you [119] like, I will enumerate the assessments. Let's see. I will have to go through them.

Q. Is it not true, Mr. Berger, that you made what you call jeopardy assessments on the King-Hoover Construction Company prior to the time that you had knowledge of the exact amount of the liability, did you?

A. Well, I did not make jeopardy assessments, but it is true that in one case a jeopardy assessment was made legally under section 3612 of the Internal Revenue Code.

Q. Who was that made by?

estimony of Sam Berger.)

A. I believe that the assessment was signed by Mr. Stanford? Is that right? I am not familiar, in view of the fact that the original returns are not in my hands. I merely have the assessment list, so I couldn't really answer your question factually.

Q. Now, would you just state, Mr. Berger, the dates that the assessment was made, and the dates that demand was made for the payroll taxes due for each of the four quarters which I mentioned?

A. The assessment for the third quarter of 1951 was received by our office on October 9th.

And the warrant for distraint was issued on that date. An assessment for the employment taxes due for the second quarter of 1951 was received in our office [120] on August 27, 1951, and the first notice was issued on August 27th, 1951.

Q. That notice you mentioned, do you call that demand for payment?

A. We are legally required to issue a notice and demand for payment, our form number 717.

Q. And that was issued, was it, on August 27, 1951?

A. It was.

Q. Thank you.

A. Our assessment for Federal Unemployment tax for the year 1950 was received by our office on March 12th, 1951, and the first notice was issued on the same day.

The Court: We will have our afternoon recess.

(A short recess was had.)

The Court: You may proceed.

(Testimony of Sam Berger.)

Mr. Andersen: Mark this as Plaintiffs' Exhibit 10 for identification.

(Said statement was marked as Plaintiffs'

The Clerk: Plaintiffs' Exhibit 10 for identification.

Exhibit 10 for identification.)

Mr. Andersen: And will you mark this for identification, please?

The Clerk: Plaintiffs' Exhibit 11 for identification.

(Said envelope containing assessment lists was marked Plaintiffs' Exhibit 11 for [121] identification.)

Q. (By Mr. Andersen): I hand you Plaintiffs' Exhibit 11 for identification, Mr. Berger, and ask you to state what it is.

A. It represents the assessment lists and certificates covering assessments made against King-Hoover Construction Company for the period in dispute here.

Q. That is for the last quarter of 1950, and the first three quarters of 1951, is that true?

A. That is right.

Q. And this assessment list contains, does it not, the dates when the assessments and demand for payment were made? A. Yes.

Q. And a record of taxes assessed against the King-Hoover Construction Company, and the payments made on those assessments, is that right?

A. That is right.

Mr. Andersen: We offer in evidence the assessment lists.

Mr. Stroud: No objection.

estimony of Sam Berger.)

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit 11 in evidence.

(Said assessment lists were received in evidence and marked Plaintiffs' Exhibit 11.)

Q. (By Mr. Andersen): Mr. Berger, I will ask you if you used as the basis for the assessment the payroll reports filed by the King-Hoover Construction Company?

A. In every case, except that of the jeopardy assessment, which was made for the one quarter.

Q. And the jeopardy assessment, I take it, was made prior to the date that you had received a payroll report covering the period for which that assessment was made?

A. I think that is correct.

Q. Now, you state, do you, Mr. Berger, that you had no connection with this King-Hoover Construction Company delinquent account prior to May 1952?

A. No. I stated that I had not had any contact with Mr. Monsees prior to that date.

Q. Would you state what your activities were concerning this delinquent account in 1951?

A. In the early part of 1952, I was given the warrants for distraint on King-Hoover Construction Company then outstanding, and I was a member of the Seizure and Sales Squad, and I was required to secure collection for the Government. I investigated to determine the necessary means for collection.

I determined that one lien—no, I determined



(Testimony of Sam Berger.)

[123] that collection was required by seizure, and turned the accounts over to Mr. Yager, who was then the head of the seizure operation, and he proceeded to seize and sell and collect the tax.

Q. You didn't have any connection with this account before 1952, then, is that your testimony?

A. Not to my knowledge.

Q. I hand you Plaintiffs' Exhibit 10 for identification, and ask you if you recognize that statement?

A. No, sir.

Q. You have never seen that before?

A. No, sir.

Q. You don't know by whom it was prepared?

A. May I examine it again?

Q. Yes.

A. There is no identifying characteristics. It is a typewritten statement. I don't know who prepared it.

Q. I hand you here Plaintiffs' Exhibit 2 in evidence, and ask you if you have ever seen that before?

A. No, sir.

Q. Do you know whether or not the sum represented by that check was applied against the indebtedness of King-Hoover Construction Company?

A. I could not answer that question without tracing the block number, the date of payment, and date of [124] cancellation.

Q. Would that information appear on the assessment list you just handed me if it were so applied?

estimony of Sam Berger.)

A. This payment would be reflected either wholly against one account, or separately against several accounts.

Q. Could you tell the Court whether or not that check was applied against the King-Hoover Construction Company's debts?

A. Yes, sir, that was applied to the account number 2-170310-51, Employment Taxes.

Q. For what period?

A. I believe that is the fourth quarter of 1950.

Q. Thank you. You don't know whether this check was sent in with a return filed for the first quarter of 1951, or not, do you?

A. That I could not determine.

Q. Is it the practice of your office, Mr. Berger, when you receive money like this, to apply it on the oldest account that you have for that particular concern?

A. No.

Q. The oldest in point of time, I am speaking of.

A. No, it is not. In view of our duty to protect the lien rights, the practice is to apply payments to the newer accounts. [125]

Q. Do you observe the wishes of the taxpayer when they submit a check of that kind in application to a particular indebtedness, or do you just use your own discretion on what it should be used for payment of?

A. That is a question which cannot be completely answered here. It is a subject of a good deal of discussion. If the taxpayer specifically requests that an account be credited, a specific ac-

(Testimony of Sam Berger.)

count be credited, and the application does not injure the Government's prior liens, it would be done.

Q. But you would ignore the request of the taxpayer if you felt that it did injure the Government's lien or position?

A. No, sir, I would take the taxpayer on his request to my superior, and let him make the decision. We don't ignore the request of any taxpayer. If the matter came up, it would not be one for me to decide.

Q. If a check accompanies a return, and it indicates, because of a correspondence between the amount of the check and the amount shown to be due on the return, would you consider that a request of the taxpayer to have that check applied on the payment of the return it was submitted with?

A. Normally the payment never reaches my hands, nor does the check—the current return or delinquent return [126] would be processed by the Commissioner's division, and the check would be applied to the return it accompanied, as a matter of course.

Q. Is that always done?

A. With the thousands of returns that are involved each month, it would be impossible to do otherwise, unless the check does not coincide with the amount of the return.

Q. I think you stated just a moment ago, Mr. Berger, that this check was applied in payment of

testimony of Sam Berger.)

amount due for the year 1950, and this check  
its date of May 8th, 1951.

How do you explain the fact that this was ap-  
plied to the payment of 1950 indebtedness when  
it was submitted in 1951 with another return?

A. I cannot state that it was submitted with  
another return. I can state that we are continually  
receiving payments after accounts are assessed and  
paid, and that we apply them to those accounts.

Q. Could you state under oath that if this were  
submitted with another return that it would be ap-  
plied in payment of the indebtedness shown due  
on that return?

A. I could not state under oath, because I did  
not handle the check.

Q. You don't know, then? [127]

A. I could state the practice, that the check is  
applied to the return it accompanies.

Mr. Andersen: I think that is all.

#### Cross Examination

Q. (By Mr. Stroud): Mr. Berger, do your as-  
sessment lists that are introduced in evidence by  
the plaintiffs show the date on which these assess-  
ment lists were received by the Commissioner here  
in Phoenix?

A. They do show the dates they were received  
at that time by the Collector in Phoenix.

Q. Now, sir, directing your attention to an in-  
terview that you had with Mr. Monsees on May  
15th, 1952, do you recall such a meeting?

(Testimony of Sam Berger.)

A. Very clearly.

Q. Who was with you on that time and occasion, sir?

A. Mr. Jack Stanford, a Deputy Collector of the Collector of Internal Revenue's Office.

Q. Did you go to see Mr. Monsees on that date and at that time to ask him some questions concerning the King-Hoover Construction Company?

A. I did.

Q. Did you make notes on what his answers in response to your questions were? [128]

A. Yes, sir, I did.

Q. I will ask you, sir, if he told you at that time and on that occasion that he, as such, nor Mr. Willis had any supervisory capacity on the job up in Bellmont, Arizona?

A. He did, sir.

Q. Did he made that statement to you?

A. Yes, sir.

Q. And in the presence of Mr. Stanford?

A. Yes, sir.

Q. Did he also tell you that he had no active part or participation in the job at Bellmont which was being undertaken by the King-Hoover Construction Company? A. Yes, sir.

Q. Did he tell you also at that time and occasion that the direction and supervision of the job was handled by the King-Hoover Construction Company through Mr. Hoover?

Mr. Andersen: If the Court please, this is leading the witness, your Honor.



testimony of Sam Berger.)

Mr. Stroud: This is cross-examination.

The Court: Everything you asked, I knew the answer before it was given. The witness testified the same thing.

The Witness: I will be happy to read his answers [129] word for word. I have them here.

The Court: Mr. Monsees didn't testify to anything different.

Mr. Andersen: If the Court please, I don't know what purpose this serves.

The Court: It isn't serving any, because I have heard the same thing before from Mr. Monsees. He doesn't claim he had charge of that work up there.

Q. (By Mr. Stroud): Did Mr. Monsees on that one and occasion tell you that he was in this picture to protect the loan of Mr. Willis to the King-Hoover Construction Company?

A. Yes, he did, sir.

Q. Did he tell you he was on the job up at Bellmont approximately once a month?

A. Yes, sir.

Mr. Stroud: That is all.

#### Redirect Examination

Q. (By Mr. Andersen): The purpose of this conversation on May 23rd, 1952, Mr. Berger, was not for the purpose of finding out what assets, what other assets were owned by way of equipment that you could get hold of that belonged to King-Hoover Construction Company? [130]

(Testimony of Sam Berger.)

A. No, sir, not at all.

Q. What was the purpose of that visit?

A. Mr. Willis, through Mr. Monsees, filed a claim for refund of taxes which he claimed were paid in error, or, that is, were tax moneys that were seized in error.

As a result of the claim for refund, I was requested by the Deputy Commissioner, a Deputy Commissioner in Washington, to secure answers to specific questions. In the presence of Mr. Stanford, we asked these questions and secured these answers.

Q. Did you have anything to do with levying on the equipment belonging to King-Hoover Construction Company?

A. I made one trip to examine—let me change that. I had had several years experience with heavy duty equipment.

Mr. Stroud: If your Honor please, I don't think that particular question is directed to this lawsuit. I don't believe it is material.

The Court: I can't see that it is. It may be.

Mr. Andersen: Well, about the only object of this examination, your Honor, is to show that they did investigate this equipment, and that the equipment, we want to prove later on, the equipment existed at the time they took these funds in payment of debts. [131]

The Court: You mean the Government was overpaid?

Mr. Andersen: Well, they were, that, too. But that wasn't the object of it.

testimony of Sam Berger.)

The Court: All right, go ahead.

Q. (By Mr. Andersen): Go ahead, Mr. Berger.

A. I made one trip to examine a D-7, I believe was, caterpillar tractor, to attempt to secure the actual numbers on that piece of equipment. That is the only connection I had with any of the actual seizure or sale thereafter.

Q. You do know, though, of your own knowledge, do you not, Mr. Berger, that there was a great deal of King-Hoover's equipment which was seized under a warrant of distraint, and the funds applied in the payment of these payroll taxes, as shown by this assessment list?

A. Yes, I do.

Q. Do you know approximately how much that was?

A. No, as I stated before, the warrants went to the seizure Deputy Collector, and left my hands. After leaving my hands, with other cases to consider, I had no time for it.

Mr. Andersen: I think that is all. [132]

### Recross Examination

Q. (By Mr. Stroud): This levy on this property up there was made to get payment on additional income, on back payroll taxes that were owed to the King-Hoover Construction Company, were they not, Mr. Berger?

A. Yes, sir.

Q. There is no doubt that the \$867.23 was a tax levied by the King-Hoover Construction Company, was there?

A. No, sir.

(Testimony of Sam Berger.)

Q. There hadn't been any overpayment of any payroll taxes as yet from the King-Hoover as yet, has there?

A. Any overpayment which resulted from the sale and seizure of that property I believe was returned. There was a slight amount which the sale realized, although I am not familiar with the exact amount.

Q. You mean the property brought in more money than the tax owed?

A. Yes. And that money was returned.

Q. That money was refunded? A. Yes.

Mr. Stroud: That is all. [133]

#### Redirect Examination

Q. (By Mr. Andersen): Who did that money go to, do you know?

A. Mr. Stanford may have that information in his file. I don't know.

Mr. Andersen: That is all.

(Witness excused.)

Mr. Andersen: I call Mr. McRae.

#### WILLIAM McRAE

called as a witness in behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

Q. (By Mr. Andersen): Will you state your name, please? A. William McRae.

Q. What is your occupation, Mr. McRae?

(Testimony of William McRae.)

A. Attorney at law.

Q. What was your occupation during the year 1951?

A. I was head of the income tax division in the office of the Collector of Internal Revenue at Phoenix.

Q. Do you know Mr. Lowell Monsees?

A. Yes.

Q. Could you state when you first met him, [134] approximately?

A. I presume about 1951 or 1952, along in there, in connection with this, with the tax matter that was pending at that time.

Q. Did he come to your office in the post office building? A. Yes.

Q. Who was present at the time that you spoke to Mr. Monsees?

A. On that occasion, Mr. Monsees, one or two of the Deputy Collectors, and I don't recall whether he had anyone connected with this company or not.

Q. Could you state who the Deputy Collectors were?

A. Jack Stanford I think was one. And I wouldn't know for sure whether the other could have been either Berger or Yager, who it might have been.

Q. Could you state the substance of the conversation which took place in your office at that time?

Mr. Stroud: We object as being immaterial and irrelevant.



(Testimony of William McRae.)

Mr. Andersen: If the Court please, we have gone over this matter of the understanding of these parties about the joint venture agreement several times, and I think it is important we determine here whether or not these agents of the defendant understood the relationship [135] between Mr. Willis and the King-Hoover Construction Company, and that is the purpose of this testimony.

Mr. Stroud: I think that is a matter for your Honor to decide.

Mr. Andersen: He can only do it on evidence.

Mr. Stroud: I think it is repetitious.

The Court: It might not be of much help. Go ahead.

A. (By the Witness): The purpose of the visit was to—of his visit was more or less to claim, or to allege, that the Government was pursuing funds that was due his client as one of the joint venturers in a contract which Mr.—I have forgotten the other party's name.

Q. (By Mr. Andersen): Willis?

A. Willis, and King-Hoover Company had joined together as in a joint venture to carry out the terms of this bid or contract to do some construction work.

Q. He showed you a contract, did he?

A. I don't recall whether he showed me or whether he established by way of conversation that there was such a joint venture contract.

I was satisfied that there was an agreement

(Testimony of William McRae.)

wherein his client was supposed to have put up \$50,000 in [136] cash, and the job was substantially completed. He alleged that the bills had been paid and that there was certain profit due on the contract, that the Government agents were attempting to collect and apply against the King-Hoover tax liability that were not connected with the joint venture operation.

Q. And what did you tell Mr. Monsees in the presence of Mr. Stanford here, and whoever else was there?

A. I stated that if that——

Mr. Stroud: Same objection, your Honor, to hearsay. The first testimony he just made is hearsay. It is wholly irrelevant and immaterial. What this gentleman had to say to Mr. Monsees couldn't have any bearing on this lawsuit.

Mr. Andersen: We are dealing here with the Government, and just who the Government is is quite a question. But Mr. Monsees had to deal with someone. We have successfully established that Mr. Stanford and Mr. Berger were agents.

The Court: I will let him testify.

Mr. Andersen: All right.

A. (By the Witness): Read the question again, please.

(The pending question was read by the Reporter.)

I stated that in my opinion if the money that [137] was coming belonged to the joint venture, then

(Testimony of William McRae.)

only that part that would become the property of the King-Hoover Company, whatever percentage that might be, could be held for the payment of King-Hoover's debts. But that all of it could be held for any liability, tax liability, that is, that would be owing on the particular job.

Mr. Stroud: We renew our objection to the witness's opinion concerning the matter, concerning the joint venture.

The Court: All right.

Q. (By Mr. Andersen): Was there anything else said there, Mr. McRae, that you recall?

A. No, not that I recall. There was much more that was said, because the conversation lasted, I guess, for twenty or thirty minutes, so there was a lot said. But it has been some time ago, and I haven't taken any occasion, or had occasion to refresh my memory, outside of what has run through my mind since I was subpoenaed.

Q. You can't place this conversation exactly as to date, is that right?

A. Well, it was about the time that the final settlement was made by the Government Agency that was paying the money. It was my understanding that the levy had been filed, but that the boys in the office probably [138] didn't know that such levy had been made.

Q. It was prior in time to the date that the final payment was made, then?

A. Yes, a matter of days.

Mr. Andersen: I believe that is all, your Honor.

(Testimony of William McRae.)

Cross Examination

Q. (By Mr. Stroud): Mr. McRae, you say you didn't know anything about this so-called joint venture, except what Mr.—what the people told you from King-Hoover Construction Company, and Mr. Monsees?

A. I didn't state that. I stated that I didn't recall now whether or not they showed me the contract, or whether they told me of the contract and let me know that there was such a joint venture arrangement at that time.

Q. You didn't know whether it was a joint venture or not, except from what they told you at that time, did you?

A. Well, I satisfied myself that there was a joint venture.

Q. You didn't know how the payrolls on the records were set up at that time, of either King-Hoover Construction Company or the other, did you? [139]

A. Yes, I inquired as to that at that time.

Q. As to what Mr. Monsees told you?

A. I think each of the parties were in agreement as to certain facts as to how the payroll accounting and the other accounting was being made. I don't think there was any dispute on the facts.

Q. You mean the agents at that time agreed with everything that Mr. Monsees had said?

A. Either agreed or sanctioned it by their silence.

(Testimony of William McRae.)

Q. You assumed that they were assenting by a silence, were you?

A. I didn't call for the books.

Q. Then if that is your point, you didn't even see the books, did you, Mr. McRae?

A. No.

Q. And the only thing you know about this so-called partnership is what Mr. Monsees told you at that time?

A. No, that isn't all.

Q. You never made any audit of the books, did you?

A. No.

Q. You didn't go out and inspect the construction company job, did you?

The Court: He said he didn't.

The Witness: You want me to answer no. I told you that once. [140]

Mr. Stroud: All right.

Q. (By Mr. Stroud): You didn't know what part Mr. Willis played in this so-called partnership, did you?

A. Yes, sir, I think I did.

Q. Based on what, what Mr. Monsees told you?

A. Well, afterwards I also talked with Mr. Hoover, and Mr. Hoover confirmed everything that was said.

Q. And of course, you say you don't remember whether you saw this so-called joint venture agreement of November 16, 1950, is that correct?

A. I don't recall now whether I did or didn't.

Q. Of course, you would have to read that joint venture agreement in order to know what it was, would you not?



(Testimony of William McRae.)

A. If they had it with them, I read it.

Q. But you don't recall now whether you ever saw that or not?

A. I don't recall whether I read it at that time, no.

Mr. Stroud: That is all.

### Redirect Examination

Q. (By Mr. Andersen): Didn't you talk to Mr. McAlister of the District Attorney's office here about this in their presence? [141]

A. I talked to—yes, I am sure they called Mr. McAlister on the same matter at that time. As I recall it, I also talked with George Hill.

Q. Didn't you read this contract to Mr. McAlister over the phone, and parts of it?

Mr. Stroud: We object to counsel leading his witness, if your Honor please.

Mr. Andersen: I think it is a yes or no answer, your Honor.

The Court: We just want to get at the facts, not the technical rules of evidence.

A. (By the Witness): I did everything I could to ascertain what the facts were relating to the matter, to the ownership of the moneys that was coming, and I didn't state how the money should go, or whether it could be held without inquiring into all the facts relating to the whole transaction. And I called Hill.

(Testimony of William McRae.)

I also had an opportunity either at that time, or within a matter of a few days, to talk with Mr. Hoover, and I ascertained that there was in everyone's opinion that was connected with this, that there was a joint venture agreement, and I probably read it. But I couldn't say for sure now that I did.

If they had it with them, I know I did. [142]

Mr. Andersen: I think that is all, your Honor.

#### Recross Examination

Q. (By Mr. Stroud): You know, Mr. McRae, that there is no evidence of any joint venture agreement here except the language used in the agreement itself, don't you? A. No.

Mr. Andersen: Your Honor, Mr. McRae hasn't been in the Court room during the trial. I don't think he can be called on to answer that.

Mr. Stroud: I believe that is all.

Mr. Andersen: That is all. May the witness be excused?

The Court: Yes.

(Witness excused.)

Mr. Andersen: I call Mr. Hoover.

#### CLAUDE HOOVER

called as a witness in behalf of the plaintiffs, having been first duly sworn, testified as follows:

(Testimony of Claude Hoover.)

Direct Examination

Q. (By Mr. Andersen): Will you state your name, please?

A. Claude Hoover. [143]

Q. What is your occupation?

A. Contractor.

Q. Were you an officer of the King-Hoover Construction Company during 1950 and 1951?

A. Yes, sir.

Q. And at that time, did you enter into, as an agent of the corporation, an agreement with Mr. Willis through his agent, Mr. Monsees?

A. Yes, sir.

Q. I hand you here Plaintiffs' Exhibit Number 1 in evidence, and ask you if the last page of that contains your signature?      A. Yes, sir.

Q. Was it your understanding of this agreement, Mr. Hoover, that the proceeds from the job at Flagstaff, Arizona, would be security for the advancement of the \$50,000 named in that agreement?

A. Give me that question again.

Mr. Andersen: Read it, please.

(The pending question was read by the Reporter.)

A. (By the Witness): Yes, sir.

Q. (By Mr. Andersen): Your answer is yes?

A. Yes.

Q. Do you know where the books and records of the King-Hoover Construction Company are for the period 1950 and 1951?

(Testimony of Claude Hoover.)

A. Well, the King-Hoover Construction Company finally folded. There was a lady that kept the books for us, I mean, just kept up the payroll, and stuff like that.

Now, she has some of those books, and last night I looked for those in what little time I had, when I found out what the deal was, and I brought all that I could find, and whether or not there are some more at her place, and she since then got married, I don't know where she is, so I don't know that. I can tell you the last I knew of them, they were in Kent Pomeroy's office, and he tells me they are no longer there, so they are some place and I can't tell you right this minute.

I brought everything I could find last night.

Q. Thank you. And do you know where there is a copy of a contract between the King-Hoover Construction Company and the United States Army for the construction of this job at Bellmont, Arizona, which this lawsuit is concerned about?

A. Well, that contract is in one of the files of what I was talking about, with this Mrs. Bailey at the [145] time. There is a copy of that contract at the Navy Ordnance Depot in Flagstaff.

Q. That is the only copy that you know the whereabouts of?

A. Yes, sir, that is right.

Q. Mr. Hoover, could you just tell the Court here what activities in regard to this construction job Mr. Lowell Monsees carried on here?

A. Well, during the course of this project, it

(Testimony of Claude Hoover.)

was by agreement that Mr. Monsees was to come up to Flagstaff and make monthly inspections of the project, and he was to sign all checks, they would be co-signers on all checks to pay for materials, and that, and on the labor payroll. We made the labor payroll, but we were reimbursed weekly by a check from the Railroad Project into the King-Hoover account.

Q. When you say a check from the Railroad Project, you are talking about this bank account out of which funds could only be drawn over the signature of Mr. Monsees?

A. No, it could only be drawn over the signature of Mr. Monsees, and either Mr. King or myself. There had to be two signatures on the check.

Q. One of those had to be Mr. Monsees' signature?

A. Yes, sir. [146]

Q. Anything else that Mr. Monsees did regarding this job that you could tell the Court?

A. Well, I think that what I said pretty well covered it, except when we finally did get in dire circumstances, why, we had a lien, or an attachment on our bank account filed against us, and in order to finally keep going and finish that project, Mr. Monsees carried the remainder out of his account.

Q. His personal account?

A. His personal account, to help us get the things over the hill.

Q. Were the proceeds from this job all placed in this Railroad Project bank account, or in Mr. Monsees' personal account?



(Testimony of Claude Hoover.)

A. They were, after some date in July. I don't know. As I recall, our bank account was attached sometime in the forepart of July. I don't know. Right after the fourth, as I remember, and from that time on through September, why, Mr. Monsees gave us the money out of his account, and we gave him the check when it came in.

Q. Did you keep the payroll records of the Railroad Project separate from those of the other jobs of King-Hoover Construction Company?

A. Yes, sir, we made separate time cards always on the Railroad Project, and then I would advise Mr. Monsees—our [147] pay day was usually on Wednesday, always on Wednesday of the following week, and I would advise him on Monday, I believe, what our payroll was, and he would get me the money up to Flagstaff, and I would make the payroll.

Mr. Andersen: I believe that is all at this time.

#### Cross Examination

Q. (By Mr. Stroud): Mr. Hoover, did you at any time give any notes to Mr. Willis for any money that he advanced to you, sir?

A. You mean before the project was completed?

Q. Yes, sir.

A. I don't believe that—I am not sure, but I don't believe Mr. Willis received anything back on his \$50,000 advancement until, I believe, in September.

Q. Do you recall having given Mr. Willis any

(Testimony of Claude Hoover.)

notes either before or after the project was started for the \$50,000 advance that he made to you, sir?

A. We had an agreement prior to the letting of the contract, in order to establish us as bidders on it, we had to have additional financing, and at that time an agreement was drawn up that if we were successful as the bidders, then that there would be a contractual agreement between us.

And after we were awarded the job, we drew up an agreement on more or less of a joint adventure basis.

Q. That was the agreement by which Mr. Willis loaned [148] you the \$50,000, was it, sir?

A. Well, he didn't really loan it to us. I mean, he advanced it for the operation of the work.

Q. He was to get the money back, in any eventuality, was he? A. That is right, sir.

Q. He didn't stand to lose any money on the deal, according to the contract, did he?

A. Yes, sir, he did. If the bonding company had to finish the job, he did.

Q. Let me ask you this. Didn't the King-Hoover Construction Company, as well as yourself, personally, and Mr. King, guarantee to personally repay the loan? A. Yes, sir.

Q. To Mr. Willis, that is right, isn't it?

A. Yes, sir, it is right.

Q. Mr. Hoover, have you made any attempt or effort yourself to repay any of this loan to Mr. Willis? A. No. I haven't been able to.

(Testimony of Claude Hoover.)

Q. You say you haven't been able to?

A. No.

Mr. Stroud: That is all. Thank you, sir.

(Witness excused.)

Mr. Andersen: At this time, your Honor, we would like to call attention to some testimony that was given by Mr. [149] Monsees, I think, regarding a lawsuit which had been filed by Mr. Willis against the King-Hoover Construction Company, and Mr. King and Mr. Hoover, personally.

We would like to state, your Honor, that that lawsuit was filed, and it is not our intention to keep that lawsuit hidden from the court, but to make it known, and to stipulate that any proceeds obtained out of that lawsuit, as hopeless as it looks now, would be assigned over to the government, in the event that we succeeded in getting anything out of this lawsuit.

In other words, we don't want to be paid twice. And we just want that known to the Court at this time.

The plaintiff rests, your Honor.

Mr. Stroud: Defendant rests, if your Honor please.

The Court: Do you want to submit briefs on this?

Mr. Andersen: We would be happy to, your Honor.

The Court: How much time would you like? Thirty, thirty, and twenty?

Mr. Stroud: That is fine.

Mr. Andersen: That would be fine, your Honor.

The Court: Very well. Let the record show the case is submitted.

(Which was all of the proceedings had on the hearing of the above entitled matter.) [150]

[Endorsed]: Filed November 2, 1955.

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[Endorsed]: No. 14960. United States Court of Appeals for the Ninth Circuit. Wm. P. Stuart, Collector of Internal Revenue for the District of Arizona, Appellant, vs. J. E. Willis and King-Hoover Construction Co., Appellees. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed: December 5, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

